Petition

81-363

Office-Supreme Court, U.S.
FILED
AUG 24 1981
ALEXANDER L. STEVAS,
CLERK

NO._____

IN THE

Supreme Court of the United States

October Term, 1981

James H. Karr, *Petitioner,*

-v-

Joanne D. Karr, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

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August 20, 1981.

QUESTION PRESENTED

Does the system of military disability retirement benefits established by the Congress pre-empt the State of Montana from considering the military disability retirement pension income in arriving at an equitable apportionment of the marital assets upon divorce?

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Petitioner James H. Karr respectfully petitions that a Writ of Certiorari issue to review the final judgment of the Supreme Court of the State of Montana.

REPORT OF OPINION BELOW

The opinion of the Montana Supreme Court below, *Karr v. Karr* reported at 628 P.2d 267 (Apr. 1981), is reproduced in Appendix A, starting at page 1a.

The Findings of Fact and Conclusions of Law of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, were made and entered on or about the 26th day of February, 1980, and are not reported. A copy thereof is printed in Appendix B hereto, starting at page 25a. The judgment entered February 28, 1980, is reproduced as Appendix C, page 41a. Thereafter timely appeal was taken to the Montana Supreme Court and is reproduced as Appendix D, page 42a. Timely Motion for Rehearing in the Montana Supreme Court following its opinion was made (Appendix E) pursuant to Rules 34 and 35, Montana Rules of

Appellate Civil Procedures with the Rules reproduced as Appendix L, page 63a. The Petition for Rehearing was denied, and Remittitur issued May 28, 1981. A copy of the Order Denying Petition for Rehearing and Remittitur is printed as Appendix F, page 45a.

JURISDICTION

The decision of the Montana Supreme Court sought to be reviewed was filed April 1, 1981. The Order Denying Petition for Rehearing in the Montana Supreme Court was entered May 28, 1981, whereupon said opinion became final. This Petition was filed within the time specified in 28 U.S.C. §2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. VI, cl.2, the supremacy clause, is set forth in Appendix G.

Petitioner was retired with a military disability pension under 10 U.S.C. §1201 which is set forth in Appendix G.

Petitioner's military disability benefits are exempt from attachment or seizure by 38 U.S.C. §3101(a) which is set forth in Appendix G.

Petitioner's military disability election to have the benefits administered by the Veterans' Administration, in part, is secured by 38 U.S.C. §3105, which is set forth in Appendix G.

STATEMENT OF THE CASE

Husband and wife, both residents of California, were married in 1946 while he was attending Navy pre-flight school in Pensacola, Florida. One child was adopted and two children were born as the issue of the marriage. The parties were married thirty-one years. At the time of the divorce, Husband was fifty-five and Wife was fifty-three. Husband is now fifty-seven years of age.

Discharged in 1950 from the Navy, Husband attended Stanford University and then dental school in California. While in dental school, he was accepted in the United States Army as a senior dental student and upon graduating, began his tour of duty with the Army. He was discharged in 1969 as a Major with twenty years of service with a sixty percent disability rating due to tuberculosis (Appendix H and Appendix B, page 38a, Para. 5E).

Wife obtained a degree in dental hygiene in 1955 and her Masters degree in dental hygiene from the University of Iowa in 1969. Wife began her Masters study in 1968 while Husband was at Ft. Campbell, Kentucky, several months before Husband was discharged from the Army.

Upon discharge, Husband elected not to participate in either the Retired Serviceman's Family Protection Plan (10 U.S.C. §§1431-1446) or the Survivor Benefit Plan (10 U.S.C. §§1447-1455).

In 1979, he elected to have a portion of his benefits administered by the Veterans' Administration. Eighty-nine percent of his benefits are non-taxable under 26 U.S.C., §104(a)(4). (Appendix G, page 49a; Appendix A, page 13a).

Both parties taught at the University of Edmonton, Alberta, Canada, from 1969 to 1971. Neither party worked for two years after leaving the University of Edmonton, but remained in Bounty, Saskatchewan, Canada. In 1973, Husband opened a dental practice in California but closed the office after six months. The family then moved to Oyen, Alberta, Canada, where Husband was to open a dental practice. However, Husband left for California to obtain his commercial pilot's license and later returned to Oyen, Alberta, Canada. In 1975, Wife obtained a college teaching position in a dental hygiene program in Helena, Montana. Husband believed, in 1975, the Wife would teach two years in Helena, and then the entire family would return to California. From 1975 to 1977, Husband was in and out of Canada, Montana, and California. Wife established a residence in Montana and filed for a divorce in May of 1977.

The Trial Court granted Wife temporary custody of the minor son, Kurtis Karr, and entered a decree dissolving the marriage on October 6, 1977. On September 28, 1978, custody of the son was granted Husband. Trial of the property division was held April 12th and 13th, 1979, and August 14, 1979. (Appendix B, page 25a). The parties had been divorced seventeen months before the hearings began on the division of the marital assets. References to the trial are limited to the hearings on the division of the marital assets.

At the time of trial, Husband was receiving $1,105 per month as retired military disability benefits (10 U.S.C. §1201). The Trial Court found the present value of those benefits to be $355,896 based on his life expectancy. The Trial Court found Wife's current expenses were $800 per month and to provide her with an equivalent income at age 62, when she would retire, would require an income of $1,400 per month. The cost of an annuity to provide $1,400 per month retirement income to the Wife would cost $122,528 at the time of trial (Appendix B, Para.20, page 33a).

The Trial Court held that it could not per se include the Military Disability Benefits as marital assets based on the reasoning in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1, but did rule that it could consider the disability income in making an equitable apportionment of the marital assets. The Montana Supreme Court affirmed this approach (Appendix A, pages 12a-13a).

The principal asset of the parties was a home purchased in San Rafael, California, in 1957 for $26,500 (RT - Aug., pg. 113), and held by the Wife and Husband as joint tenants. The San Rafael home was rented from 1960 to 1979 due to their absence from California (Appendix B, pg. 27a). The home was appraised in December of 1977 for $135,000.00; appraised again in December of 1978 for $160,000.00; and appraised a third time in April, 1979, for $185,000.00. The Trial Court accepted the $185,000 appraisal figure because that was the appraisal at the time the Trial Court began the hearing for the division of the marital assets (RT Apr., pg. 93). In a period of sixteen

months, the appraisal increased $50,000. The Trial Court found the net estate of the parties was $286,389 (Appendix A, pg. 7a), for the marital assets and their value). Wife was not awarded any maintenance. The Trial Court awarded Wife assets on a two-to-one ratio or $190,926 and ordered her to deliver to the Trial Court all indicia of ownership to the marital assets which would be delivered when the Husband satisfied the judgment. Husband has not satisfied the judgment although efforts are being made by Wife to enforce the judgment in California by a Sheriff's sale on the San Rafael property by an ancillary proceeding to enforce the Montana judgment under the full faith and credit clause (Article IV, Clause 1). Husband could not obtain a supersedeas bond for his appeal to the Montana Supreme Court nor for his Petition to this Court.

Husband asserted the disability benefits were not property, could not be considered as such in any manner by the Trial Court and could not be offset by awarding Wife property equal to the disability that may be received by him during his lifetime. The issue was raised in the Trial Court by Husband as follows:

(a) By his proposed Findings of Fact, Conclusions of Law and Judgment dated November 15, 1979. Pertinent portions of the proposed Findings are printed herewith as Appendix I, starting at Page 56a.

(b) By the briefs of counsel in the Trial Court.

(c) By Post-Trial Motions dated March 10, 1980. Pertinent portions of these motions are printed herewith as Appendix J, starting at Page 60a.

(d) On appeal by Specification of Error and argument thereon in Petitioner's Brief to the Montana Supreme Court, a copy of the pertinent specifications are printed herewith as Appendix K, starting at Page 62a.

(e) By the Petition for Rehearing to the Montana Supreme Court, a copy of the pertinent excerpts are printed herewith as Appendix E, starting at Page 43a.

Wife filed a cross-appeal to the Montana Supreme Court and asserted as error the failure of the Trial Court to

include the present value of the disability benefits as a marital asset (Appendix N, page 66a).

The Supreme Court of Montana held the disability benefits were not directly affected, the lump sum award to Wife was not an offsetting award and affirmed the lump sum to Wife was made "... to provide her with a like retirement source ..." (Appendix A, page 9a) as Husband had from his military disability pension.

The Transcript of the Evidence in the Trial Court will be filed. The Transcript for September 25, 1978, does not pertain to the division of the marital assets.

ARGUMENT

I.

The Decision of the State Court Below Is in Conflict with Decisions of This Court

A. The conclusion of the Montana Supreme Court that regardless of whether the income from a retired military disability pension is treated as part of the marital estate, the disability income can be considered in arriving at an equitable apportionment of the marital estate is in direct conflict with the decisions of this court in *McCarty v. McCarty*, 453 U.S. 000 (July 2, 1981), and *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 588, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979).

The award of a lump sum of $190,926 to the Wife on a ratio of two-to-one of the marital assets was done by the State Courts "*...to provide her [Wife] with a like retirement source...*" (Appendix A, pg. 9a), that was received by Husband from Congress for his 60% military disability. An offsetting award to the nonmilitary spouse is in conflict with the principle enumerated in *Hisquierdo* and reiterated in *McCarty* (Slip.Op.,pg.18,ftn.22, citing *Hisquierdo* at 588).

The *McCarty* decision has affirmed that military retired pay is reduced compensation for reduced current services; that the military retirement system confers no entitlement to retired pay upon the retired service

member's spouse; that military retired pay is the personal entitlement of the retired member; that Congress intended military pay actually reach the beneficiary and this mandate cannot be circumvented by the simple expedient of an offsetting award. McCarty concluded:

> "Thus, the conclusions that we reached in Hisquierdo follows a fortiori here: Congress has weighed the matter, and '[i]t is not the province of state courts to strike a balance from the one Congress has struck.' 439 U.S. at 590." *(McCarty,* slip.Op. pgs. 25-26).

Based on *McCarty,* this Court granted certiorari in *Miller v. Miller,* 453 U.S. 000, (No. 80-29), on July 2, 1981, and vacated the decision of the Montana Supreme Court which had affirmed the Trial Court's award to the Wife of 38.5% of the Husband's nondisability military pension. The *Miller* decision is reported in 609 P.2d 1185 (Mar. 1980). This counsel represented Mr. Miller in the Trial Court, the Supreme Court of Montana, and this Court. Montana, unlike California, is not a community property state *(Cook v. Cook,* 495 P.2d 591,159 Mont. 98 [1972]).

This Court also granted certiorari in *Milhan v. Milhan,* (No. 80-578), and vacated the judgment which awarded the wife one-half of the husband's Naval retirement pay and one-half of the value of the husband's military life insurance policies. Milhan, like Petitioner herein, had elected to have his pension administered by the Veterans' Administration. This Court also denied certiorari in *Cose v. Cose* when the Alaska Supreme Court ruled the military pension was not divisible upon divorce. *Cose* is reported at 592 P.2d 1230 (1979).

In *Hisquierdo,* the wife relied on *In re Milhan,* 13 Cal.3d 129, 528 P.2d 1145, cert.den. 421 U.S. 976 (1975), that the state court could determine the expected value of her interest and award her a compensating amount of other property available for distribution *(Hisquierdo,* at pg. 588). In rejecting any anticipated benefits by an offsetting award, the Court firmly enumerated the pitfalls that may occur to the retired military spouse if this

approach were permitted in a divorce proceeding:

> "An offsetting award, however, would upset the statutory balance and impair petitioner's economic security as surely would a regular deduction from his benefit check." *(Hisquierdo* at pg. 588).

Miller was decided by the Supreme Court of Montana March 27, 1980. The Trial Court's Findings in *Karr* were issued February 26, 1980, prior to the Montana Supreme Court's opinion in *Miller v. Miller.* The Trial Court followed *Hisquierdo* to the extent it ruled pro forma Husband's retirement pay may not be included in the marital estate (Appendix B, Para. 3, Conclusions of Law, Page 37a). The Trial Court then proceeded to consider Husband's capacity to earn income as a pilot or a dentist *and* his military disability income when the Trial Court apportioned the marital estate. The Trial Court and Montana Supreme Court held the lump sum award was not an offset award for the military disability income received by Husband (Appendix B, page 39a; Appendix A, page 8a).

Despite remonstrances to the contrary, the Trial Court and Montana Supreme Court decisions leave no doubt the division of the marital assets was made in whole or in part to offset the disability benefits of the Husband. The Conclusion of Law in question which was upheld by the Montana Supreme Court (Appendix B., Para. 5H, Page 39a) states:

> "H. While the respondent's pension cannot be included in the marital property, or used as a set off, it can be considered as a source of income in arriving at the equitable apportionment required by the statute, just as it may be used in determining alimony or maintenance. *Eschenburg v. Eschenburg,* 171 M. 247; *Cromwell v. Cromwell,* 36 St.Rep. 60. *The federal law may hold our wrist from reaching into respondent's retirement salary, but it need not blind our eyes to the*

reality of the situation. Respondent has a comfortable, secure retirement income, in being, for the rest of his life. *Petitioner, although she contributed as much to it as he did, will never receive a cent of it.* After respondent had begun enjoying his retirement income the petitioner was forced to begin a retirement program of her own, at the age of 50, with an organization from which she could be dismissed, without fault on her part, next year. She has, in a word, a very small retirement fund at present and virtually no retirement security." (emphasis added).

On appeal, the Supreme Court of Montana approved subparagraph "H" of the Trial Court's Conclusion of Law, supra, stating:

"The District Court did not include the pension as a part of the military profit, nor use it as a set off ..." (Appendix A, page 8a).

* * *

"... Inasmuch as James had a pension of $13,260 a year, and the capacity to earn additional monies as a dentist or pilot, the court concluded it would award a lump settlement to JoAnne sufficient *to provide her with a like retirement source,* in view of their 31 years of marriage. (Appendix A, page 9a).

* * *

"The District Court was careful not to include the *value* of the retirement pension to be received by James as a part of the marital estate. Instead the District Court *considered the retirement pension,* and James' earning capacity as a dentist or a pilot, in determining the ability of the parties to acquire capital assets in the future ..." (Appendix A, page 10a).

* * *

"The District Court was especially thorough in its findings and in its discussion and conclusions relating to the lump sum judgment awarded in this case. In any event, with respect to the princi-

> pal contention of James, that the District Court awarded a portion of his federal military retirement pension, or utilized it as the 'lodestone' in making the lump sum award, *it is nevertheless true that nothing in the court's order affects directly the pension or James' right to receive the pension.* The present marital assets, as found by the District Court, are more than sufficient to pay the lump sum judgment. They are assets that were acquired during the marriage. When the lump sum judgment is satisfied, James' pension payments will go to him untrammeled by any restriction or order of the District Court." (Emphasis added, Appendix A, page 17a).

The Supreme Court of Montana held:

> "... We hold it proper, and in harmony with the principles of equity, that the District Court consider the income from a party's federal military retirement pension, earned during the marriage, in arriving at an equitable apportionment on the marital assets, particularly when the District Court is considering the statutory factor of the parties' opportunity for future acquisition of capital assets income." (Appendix A, pages 12a-13a).

Section 40-4-202, M.C.A., 1979, allows the Court to divide "... the *property and assets* belonging to either or both, however and whenever acquired and whether the title is in the name of the husband or wife or both ..." But a military retirement income is not property or an asset because it has no cash surrender value, loan value or redemption value *(Ellis v. Ellis,* 191 Colo. 317,319, 552 P.2d 506, 507 (1976), cited in *McCarty,* Slip. Op.,pg.12,ftn.15). Not being property or an asset, a divorce court has nothing to act upon and cannot consider the military disability income in dividing the marital assets.

The Trial Court and Supreme Court of Montana relied on Section 40-4-202, M.C.A., 1979 (Appendix G, page 52a) which sets forth the factors to be considered by the Court

in dividing the marital assets and "... particularly that clause that says 'the opportunity of each for future acquisition of capital assets and income.' ..." (Appendix A, page 7a). The statute per se is not unconstitutional but when it is applied as it was done in this case, the statute negates the Congressional purpose of military disability pensions and is not consonant with this Court's decisions in *McCarty* and *Hisquierdo*.

When the Karr judgment was appealed to the Montana Supreme Court, *Miller v. Miller* was in effect in Montana and the decision of the Trial Court that the disability income was not marital property was in conflict with *Miller*. However, the Montana Supreme Court affirmed *Karr* because the Trial Court had considered the disability income when it apportioned the marital assets and did this on the basis of *Eschenburg v. Eschenburg*, 557 P.2d 1013, 171 Mont. 247 [1976] (Appendix A, pg. 12a). *Eschenburg* was decided before *Hisquierdo* and did not consider the issues raised in *Hisquierdo* and *McCarty*. *Eschenburg* directed maintenance to be paid by the retired military spouse "... from the pension or 'in lieu thereof from any earning he may acquire in excess of said retirement'..." and regarded the military pension as "... a source of income ..." to be considered in setting the amount of maintenance for the non-military spouse (Appendix A, pg. 12a).

It is obvious from this affirmance the Montana Supreme Court believed the same result had been reached in *Karr* by the Trial Court considering the disability income when it divided the marital assets as would have occurred if the trial court had awarded the Wife a percentage of the disability benefits as was done in *Miller v. Miller*. This conclusion is substantiated by the Montana Supreme Court's action in *Ebert v. Ebert*, 616 P.2d 379, ____ Mont. ____ (Sept. 1980), which was also decided subsequent to *Miller*. The Trial Court in *Ebert* had ruled prior to *Miller* the military retirement benefits which had not vested were not marital property. The *Miller* decision was rendered prior to the appellate briefs being filed in *Ebert*. The Montana Supreme Court said counsel in *Ebert* should

have petitioned to vacate the appeal based on *Miller* but they did not do so. The Montana Supreme Court remanded *Ebert* stating the amount of child support, medical payments, maintenance and division of the marital assets would all depend on how the Trial Court treated the military retirement benefits. The Court refused to consider the issue of attorney fees, stating:

> "... in light of our decision that the property *must* be redistributed to reflect the military pension as an asset ..." (Page 380).

the Court remanded based on its decision in *Miller.*

McGill v. McGill, 609 P.2d 278 ____ Mont. ____ (Mar. 27, 1980), was decided the same day as *Miller v. Miller,* but the Montana Supreme Court made no reference in the opinion to the *Miller* decision. The case was remanded due to inadequate Findings on the net worth and "... the Court's Findings of Fact do not adequately support its award of *only* 15% of the husband's pension (military) to the wife ..." (Page 281).

Thus, prior to *Karr v. Karr,* the Montana Supreme Court was firmly committed to the principle that vested and nonvested military retirement benefits must be considered by a Trial Court as a marital asset. The trial Courts could treat the military retirement benefits as an asset subject to division by the Trial Court *(Miller v. Miller)* or the income could be considered as an asset to determine the amount of maintenance that could be paid by the military spouse *(Eschenburg v. Eschenburg,* 557 P.2d 1014, 171 Mont. 247 [1976]).

Miller v. Miller, supra, held that military retired pay is deferred compensation, not current compensation for reduced services *(McCarty v. McCarty,* Slip.Op.pg.13, ftn.16). In *McCarty,* this Court stated it did not have to decide whether federal laws "... prohibits a State from characterising retired pay as deferred compensation ..." (Slip.Op.pg.13), because of its conclusion of preemption by the federal law whether the military retirement income was defined as current or deferred compensation. In Montana, the earnings and accumulations of a married

spouse while he is living separate from his spouse are the individual property of that spouse (Sec. 40-2-206, M.C.A. 1979, Appendix G). Section 40-4-202, M.C.A., 1979, makes no provision for property acquired subsequent to the divorce. (Appendix G). The disability income of Husband was current compensation for reduced services and could not be considered for the division of the marital assets when it was income earned after the decree of divorce was entered.

The Supreme Court of Montana has flatly declared the division of the marital assets on a ratio of two-to-one in a lump sum award was "... to provide her with a like retirement source, in view of their 31 years of marriage." (pg. 272), and yet denies this is an offsetting award. The annuity cost (read "military marriage pension") for the Wife was computed at $122,578. Deducting this from her lump sum award of $190,926 would leave her with $68,348 in cash if she purchased the annuity and the Husband paid off the judgment. The Husband, on the other hand, would undoubtedly have to borrow the funds to pay off the $190,926 (if it could ever be borrowed by him at all) and he would then have a debt of $190,926 with the remaining equity of his share of the marital assets of $95,463 undoubtedly encumbered to secure the loan to pay the judgment. If Husband were not to live out his life expectancy, his heirs would inherit nothing due to the judgment having been paid and funds borrowed for that purpose. Wife would be in a cash position and Husband in a debt position all because the Husband was the beneficiary (?) of a retired military disability pension. There is no question that if the Husband did not have the disability income, the division would not have been made on the ratio of two-to-one in favor of the Wife. The Husband has been penalized by this division because of his military disability benefits.

In *Milhan v. Milhan* (No. 80-578), the Trial Court had ordered the Husband to pay the Wife one-half of the value of the military life insurance policies of the Husband. In *Karr,* the Court has ordered Husband to pay the sum of $122,578 as an annuity for the Wife. This is 35% of the benefits Husband would receive if he lived his life expec-

tancy. The Congressional purpose is defeated when the military spouse is ordered to pay his spouse one-half the value of his military insurance policies and the Husband is shorn of 35% of the value of his disability benefits by an offsetting award of marital assets to provide an annuity to his wife because she cannot directly share in his disability income upon divorce. This Court rejected an award of 38.5% of the Husband's pension benefits to the Wife in *Miller v. Miller* and the annuity award to Wife in this case based on Husband securing military disability income should similarly be rejected. As a practical matter, Husband would have been better off financially if the Trial Court and the Montana Supreme Court had awarded the Wife a percentage of his disability income. That approach would clearly place the Montana Supreme Court in the same position as *Miller v. Miller* and would not cloud the issue of considering the disability income to apportion marital assets. Also, by that approach, the division of property would not have been made on a ratio of two-to-one for the Wife, Husband would not be faced with a judgment of $190,926 and the possible eradication of any interest he has in the property accumulated during his marriage.

In *Hisquierdo,* the wife wanted the house (pg. 588). In *Karr,* the wife wanted all of the real and personal property and was content to allow Husband to retain his disability income (Appendix M). On appeal, Wife again sought to include the disability income as marital assets and sought an award of $430,190 or, in the alternative, the sum of $322,642.50 (Appendix N). If Wife is successful in selling the house in San Rafael, she, unlike the wife in *Hisquierdo,* will either directly or indirectly get the house and probably all of the marital assets and Husband will be left his monthly disability income. It may only be a coincidence due to inflation, but the value of the house in California is only $5,296 less than the lump sum award of $190,926.

All and then some of the disastrous results projected in *Hisquierdo* if anticipation of benefits were allowed by an offsetting award have been visited upon the Husband

by an approach stated by the Montana Supreme Court as not directly offsetting the disability benefits. It is difficult to imagine a more onerous result if the benefits were *directly* affected by the payment, which is denied by the Montana Supreme Court as having occurred.

If the Supreme Court of Montana or any other state court is permitted to follow *McCarty* and *Hisquierdo* only to the extent the military retirement benefits are not marital property and are given free rein to consider the military retirement benefits (1) to equitably apportion the marital assets (2) or to determine the "*opportunity*" of a spouse to acquire capital assets and income, then the *McCarty* and *Hisquierdo* decisions would be emasculated. The "opportunity" rule would be just that: it would afford every trial judge the "opportunity" to avoid *McCarty* and *Hisquierdo* and to negate the Congressional purposes of military retirement or military disability benefits that the recipient receive these funds, that the nonmilitary spouse is not entitled to any of the benefits and that the military recipient be not penalized because he received a military disability pension. The Montana divorce statutes are adopted from the Uniform Marriage and Divorce Act (Section 40-1-102, M.C.A., 1979). Other states who have adopted this Uniform Act which contain the "opportunity" clause, could easily accomplish with that clause what *McCarty* has said cannot be done and can only be done by the Congress. I.e., to make some provision for the nonmilitary spouse upon divorce.

The lump sum award to provide Wife with an annuity income has placed her in a far better position than if she were the widow of Husband. Husband had elected not to participate in either survivor program so that on his death, hiw widow would receive no benefits from his disability pension. Yet, the Montana Supreme Court has affirmed the lump sum award which includes $122,578 to provide an annuity that even Congress could not award her due to his non-participation in the survivor benefit plan.

The right asserted here that the Montana Supreme Court can consider the retired military disability income

to arrive at an equitable division of the marital assets conflicts with the express terms of federal law and its consequences sufficiently to injure all of the objectives of the federal program set forth in *McCarty* and *Hisquierdo* to require non-recognition of that right by this Court. In McCarty, this Court commented on the Montana Supreme Court permitting the heirs of the nonmilitary spouse to inherit the 38.5% of the husband's retirement benefits, stating: "... Clearly, '[t]he law of the State is not competent to do this.' ..." (Slip.Op.pg.23). Nor is the law of the State competent to consider the military disability income when it apportions the marital assets. Such an approach disables the military spouse from receiving his military disability income.

Military disability income benefits cannot be used as any part of the equation to divide the marital assets in a divorce proceeding.

B. The State Court Nullified Husband's Disability Pension Election.

The Husband had elected in 1979 after the dissolution action had begun to have a portion of his pension administered by the Veterans' Administration due to his physical disability (38 U.S.C. §3105). Eighty-nine percent of his pension is exempt from taxation under 26 U.S.C. §104(1)(4) and 38 U.S.C. §3101(d). Husband's income in 1976 was $13,231 from his disability income and only $1,470.16 was taxable. Husband did not file a tax return in 1978 because he did not have enough taxable income.

Husband contended the 89% not being taxable should not be regarded as a pension and *Hisquierdo* would be applicable because the payments:

> "... shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever either before or after receipt by the beneficiary..."
>
> 38 U.S.C. §3101(a).

This approach was taken by Husband's counsel to distinguish his military disability benefits from *Miller's* whose benefits were nondisability retirement and to comply with the opinion in *Hisquierdo* which emphasized the anti-attachment provisions of the Railroad Retirement Act which are applicable to Husband by 38 U.S.C. §3101(a).

The Montana Supreme Court rejected this position and relied upon *In re Marriage of Milhan*, 27 Cal.3d 765, 613 P.2d 812, 166 Cal.Rep. 533, which had rejected the same argument. The Montana Supreme Court held:

> "We apply the same rule as did California with respect to the contention of James that his pension, now administered by the Veterans' Administration, under its 'spend-thrift clause' is secure from anticipation or consideration as a marital asset." (pg. 275-276).

This Court granted certiorari July 2, 1981, in the *Milhan* case relied upon by the Supreme Court of Montana. The reasoning by the Supreme Court of Montana is no longer effective in view of the *Milhan* judgment being vacated by this Court based on *McCarty*.

The Supreme Court of Montana evidently believed the election by the Husband to have his pension administered by the Veterans' Administration after the litigation was pending, rendered his decision ineffective insofar as the Court was concerned when it considered the income for a property division.

Congress has placed no restrictions as to the time when the election can be exercised or its consequences. 38 U.S.C. §3105. The Supreme Court of Montana's action ignored and nullified the election by the Husband. Insofar as Montana courts are concerned, it is as if the election rights secured by the supreme federal law did not exist. The rejection of this election by the Montana Supreme Court becomes more onerous due to the fact Husband is 60% disabled.

The Congress has provided special treatment for

disabled veterans by giving them tax exempt status and making their benefits immune from creditors, levy, seizure or attachment. Congress has obviously regarded military disability income as a form of compensation akin to the monies received by a person for personal injury. Personal injury settlements are exempt from taxation in the same statute which confers a tax exemption for the disabled veteran (26 U.S.C., §104(1)). With all of these protective rights enacted by the Congress, it is anomalous for a State Court to require a disabled veteran to *justify* why he is not employed once litigation begins in a divorce action but this is precisely what was done in this matter:

> "... as compared to petitioner (Wife), (he) can earn and acquire capital assets *if he chooses to work*, at a minimum ratio of 2 to one, *with his present retirement* income of $1,105 per month, which is augmented by medical benefits and commissary privileges." (Emphasis added; Appendix B, Para. 23, page 352).

The Montana Supreme Court found no just cause why he was not gainfully employed as a pilot or dentist. Husband has the prerogative to live solely on his disability pension and not to work as a pilot or dentist. His employment prior to and during the litigation was and is minimal which proved before the divorce action that Husband was content to live on his disability pension. As in *Hisquierdo* with the Railroad Retirement benefits, Congress has fixed the amount thought appropriate to support a disabled veteran. His benefits are geared for his support without reference to any dependents, spouse or children and do not contemplate the disabled veteran must work to further support himself. Insofar as the Montana Supreme Court was concerned, the 60% disability rating was meaningless except when it was used in the equation to divide the marital assets.

Congress has prohibited any creditor from asserting a claim against a disability pension. A further anomaly occurs here where Wife is not a creditor but she is able to have Husband's disability income considered to divide the marital assets which results in a marital division of the

assets two-to-one in her favor. Wife has accomplished what no creditor can do and yet the statute, 38 U.S.C., §3101(a) makes no provision for the rights of the disabled veteran's ex-wife to assert a claim against his disability income for any purpose whatsoever.

The distinction between nondisability military benefits and disability benefits may not be required in view of *McCarty* and the writ of certiorari granted in *Milhan*. But in view of the special treatment by Congress for disabled veterans, the opinion of the Montana Supreme Court violates the Congressional purpose to assure disabled veterans that they will receive all of their benefits. The prohibition against attachment, levy or seizure by any legal or equitable process is applicable to a State court which uses the disability income to apportion the marital assets.

The action of the Montana Supreme Court nullifies the election of Husband to have his disability benefits administered by the Veterans' Administration, and to secure to him all of the preferential treatment afforded Husband by Congress. Congress has preempted this area of the law.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Petitioner, JAMES H. KARR, respectfully requests that the Court grant this Petition for a Writ of Certiorari to review the Montana Supreme Court decision in this cause and to vacate the judgment entered therein.

Respectfully submitted,

ROBERT J. EMMONS

By ORIGINAL signed by Robert J. Emmons
Attorney for Petitioner
608 Strain Building
Great Falls, Montana 59401
(406) 761-7150

DATED this 20th day of August, 1981.

STATE OF MONTANA)
: ss.
County of Cascade)

ROBERT J. EMMONS, being first duly sworn upon his oath, deposes and says:

That he is the attorney for the Petitioner, JAMES H. KARR, in the above entitled matter.

That on August 20, 1981, affiant personally certifies that three (3) correct and true copies of the "Petition for a Writ of Certiorari to the Supreme Court of Montana" were mailed to JAMES L. NORRIS, 1315 Crestview Drive, Vermillion, South Dakota 57069, as counsel for JOANNE D. KARR, Respondent.

This Proof of Service is made pursuant to Rule 33(3)(c) of the Rules of the United States Supreme Court.

ORIGINAL signed by
Robert J. Emmons

ROBERT J. EMMONS

SUBSCRIBED AND SWORN to before me this 20th day of August, 1981.

BARRY T. OLSON

(NOTARIAL SEAL) Notary Public for the State of Montana. Residing at Great Falls, Montana. My Commission expires: June 16, 1984.

Appendix

APPENDIX A

No. 80-177

IN THE

Supreme Court of the State of Montana

1981

IN RE THE MARRIAGE OF:
JOANNE D. KARR,

Petitioner and Cross-Appellant,

vs.

JAMES H. KARR,

Respondent and Appellant

Supreme Court of Montana.

Submitted on Briefs Dec. 23, 1980.

Decided April 1, 1981.

Rehearing Denied May 28, 1981.

Counsel of Record:

For Petitioner and Cross-Appellant
Robert J. Emmons, Great Falls

For Respondent and Appellant:
James L. Norris, Vermillion, SD

SHEEHY, Justice.

James H. Karr appeals from a judgment entered in the First Judicial District Court, Lewis and Clark County, in favor of Joanne D. Karr in a marriage dissolution case where the District Court awarded the wife $190,926 as a lump sum settlement of the marital estate, and an additional $15,081.69 for attorney fees.

Judgment was entered on February 28, 1980. Notice of entry of judgment was served on the same day and James made timely motions objecting to the personal jurisdiction of the court over him. He also moved to amend the findings of fact, conclusions of law, and judgment entered by the court. Timely appeal was filed by James after his motions were deemed denied.

Joanne cross-appealed with respect to her right upon dissolution for an equitable portion of the husband's military retirement.

The facts in this case are long and especially complicated. For purpose of clarity, we take, essentially, the facts found by the District Court in its findings.

The first finding of the District Court is significant because it gives a clearer understanding of the reasons for the eventual judgment entered by the District Court. The court found that James was

> "... a highly unreliable, untrustworthy, evasive, intentionally confusing, studiously misleading and, on occasion, patently perjurious witness. His testimony, given upon discovery or at trial, on material facts, was therefore approached with the greatest caution, accepted in full only where clearly substantiated by other evidence and weighed lightly in the face of conflicting evidence. The Court's distrust of this witness extends to profferred documents. As will be noted in the Conclusions of Law set forth herein, the fifty-one requests for admissions submitted by [James] after the close of discovery and immediately before trial by way of a pretrial memorandum are not deemed by the Court to be admitted for failure of the petitioner to deny

them and are not relied upon in the following Findings of Fact."

The Court further found:

"[Joanne and James] were married in Mobile, Alabama on July 12, 1946. At the time of the marriage they had no assets. [James] was attending flight school for the United States Navy in Pensacola, Florida. [Joanne] joined [him] and was employed immediately thereafter. [James] was transferred to Guam in 1947 and after a few months [Joanne] joined him and found employment and continued to live in Guam for the next thirteen months. [James] was transferred from Guam in 1948 and [Joanne] returned to the United States, residing with her mother. [James] was assigned to Moffitt Field, California in January, 1949 and the parties moved to Palo Alto, California. While [James] was stationed at Moffitt Field [Joanne] was not employed outside the home but did some entertaining as she was required to do as an officer's wife. [James] got out of the Navy in 1950 and enrolled at Stanford University in Palo Alto, California. [Joanne] was employed outside the home and remained employed until she had to leave the job when the parties moved to San Francisco upon [James] being accepted for dental school in September, 1952. [Joanne] and [James] each received approximately $2,000 from their respective father's estates, which they used to help purchase a residence in the Palo Alto area in approximately 1950. After [James] was accepted for dental school and the parties moved to San Francisco, [Joanne] managed an apartment house in exchange for free rent. [Joanne] was accepted for dental hygiene school in 1953 and the parties moved to an apartment two blocks from the school. [Joanne] was in the dental hygiene school for two years and graduated in 1955. Immediately upon graduation, [Joanne] accepted a position at the University of Califor-

nia as director of the dental hygiene program and was so employed from 1955 until 1959. While [James] was in dental school he was accepted in the United States Army as a senior dental student in 1955 and upon graduation in 1956 he was assigned in the San Francisco Bay area until 1959. The parties adopted a daughter KATHERYN ANN in 1957. In that year the parties purchased a residence located ... [in] San Rafael, California. They sold the house in the Palo Alto area and used the proceeds for the down payment on the residence, which they purchased as joint tenants. They resided in the San Rafael home until August, 1960, when they were transferred to Turkey. They rented their property from 1960 to June, 1979; the mortgage payments on the property were paid from the proceeds of rent and at the time of trial the property was unencumbered. Their second daughter, KARYN IRENE was born to them in May, 1958. During their residence in San Rafael [Joanne] took care of the housekeeping and the children and was not employed. The parties' son, JAMES KURTIS, was born in September of 1961 while the parties were stationed in Turkey. While petitioner was in Turkey she was the secretary of the officers' wives club where she assisted in writing the club by-laws and constitution. In addition she was assigned to assist newly transferred Army families. She was expected to entertain as an officer's wife which she did while in Turkey as well as while she was in the San Francisco Bay area. In the spring of 1963 [James] was transferred from Turkey to Fort Douglas in Salt Lake City, Utah. The parties were stationed at Fort Douglas from April, 1964 until August of 1965. While there, [Joanne] participated in the officers' wives club and cared for families that were transferring into the area from other installations. In addition, she was on the church altar committee, taught Sunday

School and was responsible for organizing a pre-school nursery. She also cared for the house and the children while in Salt Lake. In August, 1965, [James was] transferred to San Antonio, Texas but remained there only until December, 1965, when he became ill and was hospitalized in November and transferred to Denver, Colorado, where the parties lived from January, 1966 to February, 1967. The parties purchased a home while stationed in Denver, and sold it in 1970. They rented it from February, 1967, until it was sold. From the proceeds of the sale of this home [James] bought a 1960 Cessna 182 airplane for $9,000. While stationed in Denver [Joanne] helped in hospital recreation. In February, 1967, the parties were transferred to Fort Campbell, Kentucky and were stationed there until the latter part of 1968 when [James] retired from the Army. Fort Campbell was located in an isolated area and as a result [Joanne] was very involved in officers' wives activities and assisted the enlisted men's wives in community projects. She continued as a Girl Scout leader and helped newly-arrived Army families in becoming adjusted to the area. In September, 1968, [Joanne] began work on her master's degree in dental hygiene at the University of Iowa. This schooling was paid for by a federal government grant. [James] joined [Joanne] in December of 1968 and the parties resided in Iowa until the summer of 1969. [James] was not employed and drew unemployment benefits. The parties were both employed as teachers at the University of Edmonton, Alberta, in the fall of 1969 and taught there for two years. [Joanne] was paid $12,000 a year and [James] $16,000 a year. [Joanne] cared for the house and children in addition to her teaching. In 1971 they moved to Bounty, Saskatchewan, where they lived in a small house with a wood stove and grew most of their own vegetables. Neither party worked

while they lived there until 1972. In 1972 they went to California to open a dental practice. [James] opened a dental practice in Chico, California, in February, 1973, but closed the office after six months. [Joanne] assisted [James] in the practice. They then moved to Oyen, Alberta, where [James] signed a lease with the Big County Medical-Dental Clinic. While [James] was to open his dental practice in Oyen in November of 1973, he left to go back to California in order to take flying lessons to get his pilot's license. [Joanne] worked in the dental office in Oyen, but since [James] failed to come back to Oyen until March of 1974 this led to a lawsuit, but the parties were successful and as a result stayed in Oyen for a period of two years. In August, 1975, [Joanne] came to Helena, Montana where she was employed by Carroll College teaching in the dental hygiene program and is so employed at time of trial. [James] lived variously in Canada, Montana and California until the filing of this action in May, 1977. *He has been generally unemployed for the past four years.*" (Emphasis added.)

The District Court concluded from the above facts, which were essentially uncontested, that during the 31 years of their marriage, the contributions of the parties to the family fortune are undistinguishable both as to amount and kind and should therefore be deemed equal.

After discussing the various assets owned by the parties and the activities with respect to those separate assets either as to acquisition or disposition, the court found the marital property should be valued as follows:

"Real property located at 427 Fairhills Drive, San Rafael, California	$185,000.00
"Real property located at Stettler, Alberta	26,000.00
"Real property located in Bounty, Saskatchewan	550.00
"Life insurance	
"Equitable Insurance Co.,	8,067.75

"N.Y. Life Insurance Co.,	2,465.00
"Fidelity Mutual Life Insurance Co.,	
"Policy 965730	1,285.43
"Policy 858127	2,251.95
"Policy 859116	625.16
"Policy 971188	140.66
"Equity stock	
"Koppers Co.	4,600.00
"Diamond Shamrock	3,450.00
"White Motor	360.00
"Canadian dental retirement fund	10,505.00
"Balance of proceeds from Wells Fargo bank account	10,089.00
"Proceeds of deposit in Treasury Branch of The Province of Alberta	12,000.00
"Proceeds of deposit in Royal Bank of Conquest	4,000.00
"Canadian Bonds	15,000.00
"Total	$286,389.00"

The court further found that the marital property should be equitably apportioned between the parties on the ratio of two-to-one in favor of Joanne. The court specifically referred to section 40-4-202, MCA, in making the apportionment and considered each of the factors set forth in that section, particularly that clause that says "the opportunity of each for future acquisition of capital assets and income." In connection with that factor, the District Court found:

> "F. [Joanne] has a single source of income from a job of uncertain duration with a salary of $16,000 a year, and in which there is little reasonable expectation of advancement. [James] has a pension that provides him with $13,260 a year without working and can engage, without diminution of the pension, in the profession of dentistry or in commercial aviation. While no evidence was introduced as to how much dentists or pilots make, there is no legal requirement that Courts be born yesterday. I think it is not subject to reasonable dispute that dentists generally make a great deal more than their hygienists or more than assistant professors at Carroll or more than $16,000 a year gross

> income. The same could reasonably be said of commercial pilots, but, concededly, with not so much certainty. I conclude from this that [James'] ability and actual opportunities to earn and acquire capital assets is at least double that of [Joanne's.]"

The principal bone of contention with respect to the findings of fact seems to be the conclusion of the court that it could consider, in making the marital assets disposition, the fact that James was entitled to an army retirement pension. In connection with that, the court found in Finding No. 19:

> "At the time of the dissolution, [James] was receiving $1,105 a month as Army retirement pay. He is 55 years old. It can be reasonably expected that in the normal course of events [James] will also have all rights in the Army's lifetime medical program and its commissary privileges. [Joanne] will not share in either the pension or the medical or commissary benefits. There is no medical reason why he cannot be employed as either a dentist or pilot, both of which he is qualified to do, even though he has been rated 60% disabled for purposes of Army retirement. No good cause was shown for his being unemployed since the inception of this litigation."

The District Court did not include the pension as a part of the military profit, nor use it as a set off. It stated:

> "H. While [James'] pension cannot be included in the marital property, or used as a set-off, it can be considered as a source of income in arriving at an equitable apportionment required by the statute, just as it may be used in determining alimony or maintenance. *Eschenburg v. Eschenburg* ([1977),] 171 M. [Mont.] 247 [557 P.2d 1014]; *Cromwell v. Cromwell* [(1979), Mont., 588 P.2d 1010,] 36 St.Rep. 60. The federal law may hold our wrist from reaching into [James'] retirement

> salary, but it need not blind our eyes to the reality of the situation. [James] has a comfortable secure retirement income, in being, for the rest of his life. [Joanne] , although she contributed as much to it as he did, will never receive a cent of it. After [James] had begun enjoying his retirement income, [Joanne] was forced to begin a retirement program of her own, at the age of 50, with an organization from which she could be dismissed, without fault on her part, next year. She has, in a word, a very small retirement fund at present and virtually no retirement security."

The District Court then concluded that to maintain herself in her present way of life, Joanne required a monthly expenditure of $800. Using the evidence of a CPA, the court determined that this $800, at the time she reached age 62 would require, because of inflation, $1,400 a month to replace. Inasmuch as James had a pension of $13,260 a year, and the capacity to earn additional monies as a dentist or pilot, the court concluded it would award a lump sum settlement to Joanne sufficient to provide her with a like retirement source, in view of their 31 years of marriage.

Finally, the District Court concluded that because his prior record revealed in the proceedings in this cause, James would not obey court orders, would undoubtedly delay in any monthly payments, and the making of any order by the court was useless, unless the court could provide a way that his obeyance of the order was inescapably necessary. Accordingly, the District Court entered judgment against James to pay Joanne $190,926, as and for her portion of marital estate. She was to deliver to the District Court, in escrow, all indicia of title to marital assets that would have to be transferred to James upon satisfaction of the judgment.

The District Court also awarded attorney fees of $15,081.69, upon its finding that her attorney had expended 306.5 hours of work at $42.21 per hour, which was found reasonable, and had incurred costs of $2,145.69. The

court further found that 80 percent of the attorney fees incurred by Joanne could have been avoided if there had been a "modicum of cooperation" from James.

The issues raised by James on his appeal, restated, are these:

1. Did the District Court err in considering in any way the military pension of James?

2. Did the District Court err in awarding attorney fees of $15,081.69 to Joanne?

3. Did the District Court have jurisdiction over James when he was served by summons in the marital dissolution cause?

4. Did the District Court err by including or excluding certain assets of the estate?

With respect to the cross-appeal of Joanne, the issue she raises is:

1. Did the District Court err in not determining the present value of the future pension benefits to be received by James and including them as a part of the marital estate for division between the parties?

Isue No. 1. Did the District Court err in considering in any way the military pension of James?

This issue is inevitably connected with James' further contention that the District Court, in considering the capacity of the parties to acquire capital assets, should not have determined that James, if he chose to be employed, could earn additional income as a dentist or pilot.

The District Court was careful not to include the *value* of the retirement pension to be received by James as a part of the marital estate. Instead the District Court considered the retirement pension, and James' earning capacity as a dentist or a pilot, in determining the ability of the parties to acquire capital assets in the future. Since this is one of the factors required to be determined by a District Court in section 40-4-202, MCA, the court concluded that those factors required a two-to-one ratio in the division of the marital estate to put Joanne on the same footing as James

in her capacity to acquire future capital assets.

In *In re Marriage of Miller* (1980), Mont., 609 P.2d 1185, 37 St.Rep. 556, we approved the District Court's use of the present value of a husband's military retirement pension as a part of the marital estate. *Miller* relied (as does James in this case) on *Hisquierdo v. Hisquierdo* (1979), 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1. There, the District Court had held that the treatment of a railroad pension receivable under the Railroad Retirement Act, 45 U.S.C. § 231 et seq., as community property, violated the purpose of the act and was prohibited by the federal supremacy clause. We distinguished *Hisquierdo* from the *Miller* situation, particularly because the provisions of the Railroad Retirement Act explicitly terminated a spouse's benefits upon absolute divorce. We said we could not determine that the federal statutes relating to military retirement pensions directly or indirectly prevented the distribution of the value of the pension rights as a part of the marital estate.

In, *In re Marriage of McGill* (1980), Mont., 609 P.2d 278, 37 St.Rep. 578, we expressed dissatisfaction where the District Court awarded the wife only 15 percent of the husband's military pension. There is no other clear holding in *McGill* that would be applicable with respect to the military pension in this case.

In *Ebert v. Ebert* (1980), Mont. 616 P.2d 379, 37 St.Rep. 1674, we noted a complicated situation in that the husband had not yet retired so as to be eligible for his military pension, although the wife claimed the military pension should be considered as a part of the marital estate. We reversed and remanded the cause in that case for a consideration by the District Court as to whether the military pension should be considered a part of the marital property.

It is a duty of the District Court, in apportioning the marital assets, to consider "the opportunity of each for the future acquisition of capital assets and income." Section 40-4-202, MCA. In *Smith v. Smith* (1981), Mont., 622 P.2d 1022, 38 St.Rep. 146, we remanded the cause because we

found that the court had failed to consider the wife's inability to acquire property or income in the future.

Although in the foregoing cases cited, this Court has come down on the side of including federal military pensions as a part of the marital estate, such rulings are of no significant moment here. The District Court in this case was careful not to include the value of the military pension as a part of the marital estate. Instead, the District Court considered James' pension income, and his capacity to earn other income, in determining their respective opportunities for the future acquisition of capital assets and income. In that light, the reasoning of the court is not far separated from that of this Court in *Eschenburg v. Eschenburg* (1976), 171 Mont. 247, 252, 557 P.2d 1014, 1016, wherein we said:

> "Defendant argues that his Army pension is not property jointly acquired during the marriage and as such is not subject to division whereby plaintiff received a portion. What defendant fails to comprehend is that the district court made no property division of the pension but directed defendant to pay $500 per month *alimony* from the pension or 'in lieu thereof from any earnings he may acquire in excess of said retirement.' Without acquired property subject to property division, *the pension is a source of income to defendant which the district court properly considered* in fixing his financial ability to pay alimony as related to the financial needs of plaintiff." (Emphasis added.)

[1] The *Eschenburg* case was a decision relating to section 21-139, R.C.M. 1947, now repealed, but the logic of that case is applicable though the statute here pertinent was enacted later as a part of the new family law code. Section 21, Ch. 536, Laws of 1975. The command of section 40-4-202, MCA, is that the District Court make an equitable apportionment of the marital assets. We hold it proper, and in harmony with the principles of equity, that the District Court consider the income from a party's federal military retirement pension, earned during the

marriage, in arriving at an equitable apportionment on the marital assets, particularly when the District Court is considering the statutory factor of the parties' opportunity for future acquisition of capital assets and income.

[2] James contends further that 89 percent of his pension is exempted from federal taxation, and as such that portion of his pension should not have been considered available when the court apportioned the marital assets. On this basis, James distinguishes our holding in *Miller,* because his pension is a disability pension, whereas, Miller's was not. On this basis, James contends that the *Hisquierdo* case is applicable.

James was discharged from the Armed Services for retirement by reason of physical disability. 10 U.S.C. § 1403, relating to disability retirement pay, provides that part of the retirement pay of a member of the Armed Services, which exceeds the retirement pay that he would have received if it were not computed on the basis of percentage disability, is not considered as pension, annuity or similar allowance. Under 26 U.S.C. § 104(a)(3), the amount of any pension resulting from an allowance for personal injuries or sickness is exempt from federal income taxation. James contends that 89 percent of his retirement represents the excess of his pension received because of his disability, is not taxable, and should not be regarded as a pension. Therefore, he insists that it may not be considered by the court for any purpose in connection with the marital dissolution. His pension, or a part thereof, is now administered by the Veterans' Administration. Under 38 U.S.C. § 3101(a), payments made under any law administered by the Veterans' Administration are not subject to taxation, creditors claims, nor to any attachment or levy. These factors, James contends, brings the disability portion under *Hisquierdo,* supra, which involved a flat prohibition against attachment and anticipation.

In answer, Joanne maintains that the administration of James' military retirement pension, or a portion thereof, by the Veterans' Administration, was accomplished by him after the commencement of this litigation in 1979. Joanne further contends that this issue is answered by the

case of *In re Marriage of Milhan* (1980), 27 Ca.3d 765, 613 P.2d 812, 166 Cal.Rptr. 533.

In *Milhan*, the trial court had awarded the wife one-half of the husband's military retirement pay and one-half of the cash surrender of his military insurance policies. The husband contended that under *Hisquierdo*, the award of the pension fund and of property equivalent to her community property interests in the military insurance policies was error. The California Supreme Court rejected this *Hisquierdo* argument, saying:

> "IN *Fithian* [10 Cal.3d 592,517 P.2d 449, 111 Cal.Rptr. 369] this court found that 'California community law [does not] interfere [sic] in any way with the administration or goals of the federal military retirement pay system ...' *(Fithian, supra,* 10 Cal.3d at p. 604, 111 Cal.Rptr. at p. 377, 517 P.2d at p. 457.) Accordingly, the court held that state law was not preempted. Nothing in *Hisquierdo* conflicts with this conclusion. Military retirement pay was enacted, inter alia, to 'provide [servicemen] with an incentive to *remain* in the Armed Services ...' (Id. at p. 599, 111 Cal.Rptr. at p. 373, 517 P.2d at p. 453.) The federal interest which required preemption in *Hisquierdo*—an incentive for pension holders to retire—does not exist in the military retirement system." (Emphasis added.)

Milhan disposes of the same contention now raised by James in this case respecting the administration of his pension by the Veterans' Administration. It is stated in *Milhan:*

> "Mr. Milhan opted to receive a pension administered by the Veterans' Administration. This opinion [sic] is computed solely on the basis of his disability. (See 38 U.S.C. §§314, 334.) In order to receive this benefit, Mr. Milhan waived his right to an equivalent amount of retirement pay. (38 U.S.C. §3105.) The reasoning of *Stenquist* applies with equal force to this situation and to

title 10 disability benefits. However classified for administrative purposes, disability benefits under *Stenguist* [sic] are separate property in California only insofar as they exceed the amount of retirement pay waived. Significantly, Mr. Milhan does not appear to contest this proposition. Instead, he contends that under *Hisquierdo* the rule in *Stenquist* violates the supremacy clause of the United States Constitution.

"This contention lacks merit. Insofar as disability benefits replace retirement pay waived as a condition of receipt, they perform the same functions as retirement pay. *(Stenquist,* supra, 21 Cal.3d [779] at p. 787, 148 Cal.Rptr. 9, 582 P.2d 96.) Since the division of military pay as community property does not violate federal supremacy, it follows that no substantial federal interest is damaged by the division of 'disability' benefits which serve identical purposes.

"Mr. Milhan's attempt to avoid state law by citing the 'spendthrift' provision the Veterans' Administration applies to the benefits it administers would substitute a 'conflict in words' for the practical clash of interests which the Supreme Court has required for preemption. *(Hisquierdo, supra,* 439 U.S. at P. 581, 99 S.Ct. at p. 808.) Where a practical understanding of state and federal objectives demonstrates that both may be fully achieved, comity precludes the preemption of state law based only on semantic inconsistencies. (Citing cases.)"

We apply the same rule as did California with respect to the contention of James that his pension, now administered by the Veterans' Administration, under its "spendthrift clause" is secure from anticipation or consideration as a marital asset.

In objecting to the amount of the lump sum award to the wife, James also contends that the District Court showed its preference that he work rather than be

unemployed and that it was improper for the District Court to consider James as having any income beyond the military pension which he is receiving.

The District Court, noting that James had been unemployed for some four years, nevertheless found that as a dentist or as a pilot, although the record showed no income earnings for these occupations, it would assume that his earnings from either of those occupations would be at least $16,000 per year, the amount that Joanne was making as an associate professor at Carroll College.

In effect, James objected to the District Court including his *capacity* for earnings as distinguished from his *actual* earnings in fixing the amount of the lump sum award.

[3, 4] It has been held that a trial court may consider the earning capacity of a husband in fixing the amount of alimony to be paid, even if the amount of alimony awarded is in excess of the actual earnings of the husband. See, *Knutson v. Knutson* (1961), 15 Wis.2d 115, 111 N.W.2d 905. Under our statutory scheme, the District Court is not bound by the actual earnings of the husband in apportioning the marital assets. The District Court can and must consider the capacity for greater earnings. Section 40-4-202, MCA, requires the District Court to consider the *opportunity* of the parties for future acquisition of capital assets and income. "Opportunity" is a broad word when used in this connection, and includes the capacity of the parties to earn future income.

The District Court in fixing the amount of the lump sum award for the wife used the criteria set out in section 40-4-202, MCA. In *Cromwell v. Cromwell* (1977), 174 Mont. 356, 570 P.2d 1129, we quoted from other cases of established standard of review:

> "... In determining whether the trial court abused its discretion, the question is not whether the reviewing court agrees with the trial court, but, rather, did the trial court in the exercise of its discretion act arbitrarily without the employment of conscientious judgment or exceed the

> bounds of reason, in view of all the circumstances, ignoring recognized principles resulting in substantial injustice."

[5] The District Court was especially thorough in its findings and in its discussion and conclusions relating to the lump sum judgment awarded in this case. In any event, with respect to the principal contention of James, that the District Court awarded a portion of his federal military retirement pension, or utilized it as the "lodestone" in making the lump sum award, it is nevertheless true that nothing in the court's order affects directly the pension or James' right to receive the pension. The present marital assets, as found by the District Court, are more than sufficient to pay the lump sum judgment. They are assets that were acquired during the marriage. When the lump sum judgment is satisfied, James' pension payments will go to him untrammeled by any restriction or order of the District Court.

The reasons given by the District Court for the lump sum payment are cogent. Most of the property comprising the marital assets is located in either California or Canada. The District Court has no jurisdiction directly to affect those parcels of property. James had shown a penchant through the course of the litigation to ignore the orders of the District Court. As the District Court alliteratively concluded, "diversity, diversion, dispersion, difficulty of division, and inaccessibility of the marital property" make distribution by parcel not feasible.

We therefore find the amount of the lump sum award, and method of payment thereof, as provided in the judgment a proper exercise of the District Court's function in this case.

Issue No. 2. The District Court erred in awarding attorney fees of $15,081.69 to Joanne.

In its findings of fact (no. 25), the District Court found that Joanne's attorney had spent 306.5 hours at the rate of $42.21 per hour for a total of $12,936 and had proven costs of $2,145.69. The District Court went on to say that a very high percentage of work involved by Joanne's

attorney, perhaps 80 percent, could have been avoided through cooperation by James.

James does not attack the hourly rate approved by the court. He does contend that the 306.5 hours is grossly excessive. James contends that section 40-4-110, MCA, allows the court to award attorney fees "after consideration of the financial resources of both parties." The court may make such an award. James contends that only the financial resources of the parties may be considered by the court and that no reference to lack of cooperation may be had by the District Court in considering attorney fees. He also contends that Mrs. Karr, earning $16,000 as an associate professor, is capable of paying her own fees.

[6] Joanne counters that the number of hours expended by her attorney was "necessary" and that the attorney fee was reasonable, considering the skill, complexity and effectiveness of the services rendered. The record shows substantial evidence introduced by both sides. Third party witnesses testified, and substantial documentary evidence was introduced by Joanne including elaborate time records and analyses of the services performed by her attorney in conjunction with the matter. The finding of the hours necessary is substantiated by evidence in the record and we are bound by the District Court's determination on that point. Rule 51(a), M.R. Civ.P.

Issue No. 3. The personal jurisdiction of the District Court over James Karr.

James contends that Montana does not have jurisdiction over his person in this matter because at the time that he was served with summons in the dissolution action, he had been enticed to return to Montana by Joanne.

The court records show that the petition for dissolution was filed in the District Court, May 19, 1977. James was served with a summons and complaint on May 31, 1977. His attorney filed a motion to dismiss on June 16, 1977, which was overruled on June 23, 1977. James' Answer was not filed until March 26, 1979, after he had

changed counsel and had retained his present counsel.

James contends that after Joanne filed for dissolution on May 19, 1977, and she had been granted on an ex parte application the custody of Kurtis Karr, she telephoned James stating that she could not control Kurtis and that she was going to go to Billings for the Memorial Day holiday. James came to Helena from Canada on May 28, 1977, and was served May 31, 1977, while he was in Helena. Joanne did not tell him during the telephone conversation that she had filed for a dissolution. James contends that the purpose of the telephone call was to get him to come to Helena, in order that he might be served with the summons, and that she knew he would come if he felt that Kurtis was left alone over the holiday.

Joanne counters that the husband's testimony was that he lived in Helena, Montana, from November 1976, and prepared an income tax return showing Helena as his residence.

[7] The District Court specifically found against James on this contention, stating that he was a resident of the state at the time by his own declaration, and that he had come to this state again upon the accurate and truthful representation of Joanne that she was unable to control their son, and he was at the time taking care of his own and other family affairs.

[8, 9] The facts found by the District Court support personal jurisdiction over James. The fact of service of summons upon a defendant within the State of Montana, properly served, gives the District Court jurisdiction over the person of the defendant. *Haggerty v. Sherburne Mercantile Co.* (1947), 120 Mont. 386, 186 P.2d 884. Every court has judicial power to hear and determine the question of its own jurisdiction. *In re Boehme* (D.Mont.1941), 41 F.Supp.426. Here again, the facts giving rise to the personal jurisdiction of the District Court over James have been found by the District Court, and its findings are supported by the record in the case. Rule 52(a),M.R.Civ.P.

Issue No. 4. The court erred by including or excluding certain assets of the marital estate.

There are several items included in the marital estate to which James makes objection.

[10] *Royal Bank of Conquest.* Here James contends that the court erred by including the sum of $4,000 as marital property which had been withdrawn from the Royal Bank of Conquest on March 11, 1977, two months before the action for dissolution was filed in Montana. James contends that this money was paid into the Canadian dental retirement plan and that the total figure of $10,505 which the court found as marital assets for the Canadian dental retirement includes this $4,000. Therefore, James contends that there is a $4,000 duplication in the marital assets. Joanne contends that there is no evidence in the record as to this item, and the District Court apparently agrees, because it found "there is no substantial evidence as to what was done with any of this money but I would view the $4,000 withdrawal as a part of [James'] 'race to the bank.'" There is no merit to James' contention.

[11] *Canadian Bonds.* The District Court included $9,000 in Canadian bonds as a marital asset. Joanne and James held six $1,000 Canadian bonds in their joint names and three $1,000 Canadian bonds were held in the name of Joanne and one each for the three children or a total of nine additional bonds. The court found that the nine bonds owned jointly with the children were purchased with no intent on the part of the parties that a present gift to the children was being made. Inasmuch as Joanne was named as a joint payee with the children in each of the bonds, we see no merit in the contention that the nine bonds were not properly a part of the marital estate.

[12] *Canadian Dental Retirement Fund.* The court valued this item in the marital estate at $10,505. James complains that there was no evidence as to what right James had to reduce this fund to present cash value, what penalty would be attached if it were withdrawn before he was eligible to use the deferred tax monies, nor was there any evidence as to the amount of taxes to be paid by

James if he drew on the fund; further there was no evidence of who the beneficiaries of the fund would be after the death of James nor any provision made for discount on the difference between Canadian funds and American dollars.

The District Court found that there was "no evidence or law ... submitted as to whether this fund was includable in the marital estate. In the absence of such a showing and in view of the fact that [Joanne] contributed to the fund itself, the fund will be included in the marital estate." The District Court has a right to rely on the record made before it. There is no merit in this contention.

[13] *Treasury Branch of Stettler.* With respect to this matter, the District Court found:

> "In January 1976, [James] withdrew $15,231 from the account and sent it to [Joanne] in Helena. [Joanne] deposited the $15,231 in American Federal Savings and Loan. A year later, in January 1977, [James] , then in and about Helena, withdrew $3,000 of this deposit and spent it on general family expenses. On the day [James] was served with the petition and summons in this case, May 31, 1977, he transferred the remaining $12,000 to the Royal Bank of Canada in Conquest, Saskatchewan, whereupon his instructions and without the consent and knowledge of Joanne, it was placed in a certificate of deposit in the names of the Karr children. This move was patently made to avoid the inclusion of the $12,00 in the marital estate. It will be included."

On the basis of the facts cited, we must agree with the District Court.

[14] *Appraisal of California and Canadian Properties.* The District Court valued the San Rafael, California, real property at $185,000 and the Stettler, Alberta, property at $26,000. Both findings were based upon appraisals presented in court. James disputes the validity of the appraisals on various grounds, but inasmuch as the court

made a finding based on substantial credible evidence in the record, the findings must be accepted by us.

[15, 16] *Other Contentions.* James also disputes the failure of the District Court to include the value of personal property owned by the parties in Helena, Montana. The parties, however, had entered into a personal property division agreement and no evidence was adduced at trial with respect to this item. Attorney fees had been incurred by the parties in Canada over real property in Canada in the amount of $10,961.50, of which $6,053.75 remained due. James contends that this matter should have been included by the court in considering the net estate. The District Court concluded that attorney fees involved were not a marital debt for which the wife should be obligated. The conclusion of the District Court that no marital debt here was involved should not be disturbed.

The final contention of the husband is that in the award of the lump sum judgment, the court did not give James an opportunity to sell the real property outside of Montana in a manner that would allow him to split the proceeds with his wife, and that because of the lump sum judgment entered by the court, he may be faced with a deficiency judgment if the real property, when sold does not realize the amounts indicated.

[17, 18] A District Court, sitting in a marriage dissolution case, has the same broad powers as a court of equity in fashioning decrees that will be responsive to the fact situations before it, effective to accomplish the objectives that the District Court, through its judgment, determines must ensue and to do complete justice. See, *Link v. State by & through Dept. of Fish & Game* (1979), Mont., 591 P.2d 214, 36 St.Rep. 355. Here, the District Court found as a fact that James was not,

> "the ordinary reluctant litigant. He is an embittered and resolute opponent of 'the system', bent on defying and defeating it whenever and wherever possible and taking unscrupulous advantage of it when he can. It would therefore be futile, even specious for this court to order him to do anything. There can be no

> scheduled payments, for [Joanne] would have to obtain judgment for each one. There can be no division of property that would rely on his participation and cooperation because he would not give either. In view of this, the only realistic judgment this court can render is one for a lump sum judgment, knowing full that even that will be avoided and evaded to the extent possible."

Those are strong words, but they are not the enunciation of a district judge short of patience or troubled by a sour stomach. The record fully supports the District Court. It is time for James to be brought to book, and for him to realize that he is not above the law, and that a District Court has the power to compel even the most reluctant or recalcitrant to obey its mandates.

Joanne's Cross-Appeal. Should the District Court have included the present value of the federal military pension as a marital asset?

[19] What we have said foregoing disposes of the cross-appeal. The District Court, in its discretion, did not include the present value of James' pension. Yet, the judgment of the Court, and the method of handling the distribution of the assets is eminently fair to Joanne. In this case, the District Court decided, in its discretion, not to include this item as a marital asset. We will leave the District Court's decision on this point undisturbed.

The judgement of the District Court is affirmed as to the appeal and the cross-appeal. Costs to Joanne.

HASWELL, C.J., and HARRISON, DALY and SHEA, J.J., concur.

APPENDIX B

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS & CLARK.

IN RE THE MARRIAGE OF: JOANNE D. KARR, *Petitioner,* and JAMES H. KARR, *Respondent*	No. 41340 **FINDINGS OF FACT, AND CONCLUSIONS OF LAW.**

The petition was filed herein on May 19, 1977. Respondent was served May 31, 1977, and appeared generally June 16, 1977 by way of motion to dismiss under Rule 12(b) (6). Hearing on dissolution, custody and child support pendente lite was held September 29th and 30th, 1977, with both parties present and represented by counsel. The Court's order dissolving the marriage and placing custody of the minor child in petitioner was entered October 6, 1977. After hearing on September 25, 1978, with both parties present and represented by counsel, permanent custody of the minor child was granted respondent. A general response to the petition ws filed March 26, 1979, raising for the first time, inter alia, questions as to the Court's jurisdiction. Trial on property disposition was held April 12th and 13th, 1979, both parties being present and represented by counsel, after which the matter was extensively briefed, the final submission being made December 21, 1979. The matter of property disposition having been fully heard, briefed and considered, the following findings of fact and conclusions of law are made by the Court.

FINDINGS OF FACT

1. I find respondent to be a highly unreliable, untrust-

worthy, evasive, intentionally confusing, studiously misleading and, on occasion, patently perjurious witness. His testimony, given upon discovery or at trial; on material facts, was therefore approached with the greatest caution, accepted in full only where clearly substantiated by other evidence and weighed lightly in the face of conflicting evidence. The Court's distrust of this witness extends to proferred documents. As will be noted in the Conclusions of Law set forth herein, the fifty-one requests for admissions submitted by respondent after the close of discovery and immediately before trial by way of a pre-trial memorandum are not deemed by the Court to be admitted for failure of the petitioner to deny them and are not relied upon in the following Findings of Fact.

2. Petitioner and respondent were married in Mobile, Alabama on July 12, 1946. At the time of the marriage they had no assets. Respondent was attending flight school for the United States Navy in Pensacola, Florida. Petitioner joined respondent and was employed immediately thereafter. Respondent was transferred to Guam in 1947 and after a few months petitioner joined him and found employment and continued to live in Guam for the next thirteen months. Respondent was transferred from Guam in 1948 and petitioner returned to the United States, residing with her mother. Respondent was assigned to Moffitt Field, California in January, 1949 and the parties moved to Palo Alto, California. While respondent was stationed at Moffitt Field petitioner was not employed outside the home but did some entertaining as she was required to do as an officer's wife. Respondent got out of the Navy in 1950 and enrolled at Stanford University in Palo Alto, California. Petitioner was employed outside the home and remained employed until she had to leave the job when the parties moved to San Francisco upon respondent being accepted for dental school in September, 1952. Petitioner and respondent each received approximately $2,000 from their respective father's estates, which they used to help purchase a residence in the Palo Alto area in approximately 1950. After respondent was accepted for dental school and the parties moved to San Francisco, petitioner managed an apartment house

in exchange for free rent. Petitioner was accepted for dental hygiene school in 1953 and the parties moved to an apartment two blocks from the school. Petitioner was in the dental hygiene school for two years and graduated in 1955. Immediately upon graduation, petitioner accepted a position at the University of California as director of the dental hygiene program and was so employed from 1955 until 1959. While respondent was in dental school he was accepted in the United States Army as a senior dental student in 1955 and upon graduation in 1956 he was assigned in the San Francisco Bay area until 1959. The parties adopted a daughter KATHERYN ANN in 1957. In that year the parties purchased a residence located at 427 Fairhills Drive, San Rafael, California. They sold the house in the Palo Alto area and used the proceeds for the down payment on the residence, which they purchased as joint tenants. They resided in the San Rafael home until August, 1960, when they were transferred to Turkey. They rented their property from 1960 to June, 1979; the mortgage payments on the property were paid from the proceeds of rent and at the time of trial the property was unencumbered. Their second daughter, KARYN IRENE was born to them in May, 1958. During their residence in San Rafael petitioner took care of the housekeeping and the children and was not employed. The parties' son, JAMES KURTIS, was born in September of 1961 while the parties were stationed in Turkey. While petitioner was in Turkey she was the secretary of the officers' wives club where she assisted in writing the club by-laws and constitution. In addition she was assigned to assist newly transferred Army families. She was expected to entertain as an officer's wife which she did while in Turkey as well as while she was in the San Francisco Bay area. In the spring of 1963 respondent was transferred from Turkey to Fort Douglas in Salt Lake City, Utah. The parties were stationed at Fort Douglas from April, 1964 until August of 1965. While there, petitioner participated in the officers' wives club and cared for families that were transferring into the area from other installations. In addition, she was on the church altar committee, taught Sunday School and was responsible for organizing a pre-school nursery. She

also cared for the house and the children while in Salt Lake. In August, 1965, respondent transferred to San Antonio, Texas but remained there only until December, 1965, when he became ill and was hospitalized in November and transferred to Denver, Colorado, where the parties lived from January, 1966 to February, 1967. The parties purchased a home while stationed in Denver, and sold it in 1970. They rented it from February, 1967, until it was sold. From the proceeds of the sale of this home the respondent bought a 1960 Cessna 182 airplane for $9,000. While stationed in Denver petitioner helped in hospital recreation. In February, 1967, the parties were transferred to Fort Campbell, Kentucky and were stationed there until the latter part of 1968 when Mr. Karr retired from the Army. Fort Campbell was located in an isolated area and as a result petitioner was very involved in officers' wives activities and assisted the enlisted men's wives in community projects. She continued as a Girl Scout leader and helped newly-arrived Army families in becoming adjusted to the area. In September, 1968, the petitioner began work on her master's degree in dental hygiene at the University of Iowa. This schooling was paid for by a federal government grant. Respondent joined petitioner in December of 1968 and the parties resided in Iowa until the summer of 1969. Respondent was not employed and drew unemployment benefits. The parties were both employed as teachers at the University of Edmonton, Alberta, in the fall of 1969 and taught there for two years. Petitioner was paid $12,000 a year and respondent $16,000 a year. Petitioner cared for the house and children in addition to her teaching. In 1971 they moved to Bounty, Saskatchewan, where they lived in a small house with a wood stove and grew most of their own vegetables. Neither party worked while they lived there until 1972. In 1972 they went to California to open a dental practice. Respondent opened a dental practice in Chico, California, in February, 1973, but closed the office after six months. Petitioner assisted respondent in the practice. They then moved to Oyen, Alberta, where respondent signed a lease with the Big County Medical-Dental Clinic. While respondent was to open his dental practice in Oyen in

November of 1973, he left to go back to California in order to take flying lessons to get his pilot's license. Petitioner worked in the dental office in Oyen, but since respondent failed to come back to Oyen until March of 1974 this led to a lawsuit, but the parties were successful and as a result stayed in Oyen for a period of two years. In August, 1975, petitioner came to Helena, Montana where she was employed at time of trial. Respondent lived variously in Canada, Montana and California until the filing of this action in May, 1977. *He has been generally unemployed for the past four years.* I conclude from all these essentially uncontested facts that during the 31 years of their marriage the contributions of the parties to the family fortune are undistinguishable both as to amount and kind and should therefore be deemed equal. (Emphasis added.)

3. In March of 1960 the parties purchased a 5% investment certificate in the amount of $5,000 from the Fireside Thrift Company at Redwood City, California in their names as trustees for their daughters Karyn and Katheryn. The interest from this account was funneled into a passbook account in the company's San Francisco office. This account was in the name of the parties and of their daughter Katheryn and was drawn on by the parties from time to time. In January of 1977 the petitioner withdrew $1,600 from the account, but when the respondent found out about it he required her to deposit the $1,600 in the name of their son in the Montana Bank of Helena. She did so without any objection of record. The passbook account was closed out by the withdrawal of $184.12, by someone, in October or November of 1977.

4. The parties had a joint passbook savings account with the Wells Fargo Bank of San Francisco with a balance of $29,840 at the beginning of 1977. On January 3, 1977, four months prior to the filing of this action, petitioner withdrew $10,000 and deposited it in The Prudential Savings and Loan Company in Butte, Montana. Subsequently and prior to the dissolution of the marriage she used $3,500 of this fund to purchase a car, $2,500 to make a down payment on a condominium at Big Sky, Montana, and $4,000 on attorney's fees and her

miscellaneous expenses. On March 11, 1977, two months prior to the filing of this action, the respondent closed the account taking $20,089. There is no substantial evidence whatever as to what he did with it. I view this as a "race to the bank" on the part of the parties in anticipation of the impending divorce. The difference between the "takes", $10,089, should be attributed to the marital estate.

5. The parties had a joint passbook savings account with an institution called the "Treasury Branch" of the province of Alberta and its office at Stettler, Alberta. In January of 1976 respondent withdrew $15,231 from the account and sent it to petitioner in Helena. The petitioner deposited the $15,000 in American Federal Savings and Loan. A year later, in January of 1977, the responddent, then in and about Helena, withdrew $3,000 of this deposit and spent it on general family expenses. On the day respondent was served the petition and summons in this case, May 31, 1977, he transferred the remaining $12,000 to the Royal Bank of Canada, in Conquest, Saskatchewan, where, upon his instructions and without the consent, concurrence or knowledge of the petitioner, it was placed in a certificate of deposit in the names of the Karr children. This move was patently made to avoid the inclusion of the $12,000 in the marital estate. It will be included. Respondent withdrew another $15,000 from the Stettler, Alberta account in November of 1976; three days later he emptied the account of all but sixteen cents by the withdrawal of $839, and in December of 1976 he closed the account by withdrawal of $227. There is no evidence whatever as to what was done with this $16,066. It may or may not have been used for family purposes and should not be included in the marital estate.

6. The parties also had a joint passbook savings account in The Royal Bank at Conquest that had $9,827 in it in December of 1976, at which time the respondent drew out $6,000. On March 11, 1977, the same day he removed $20,089 from The Wells Fargo Bank, the respondent withdrew $4,000 from the Conquest bank. By the time of the hearing on property division the account was at $203. There is no substantial evidence as to what was done with

any of this money, but I would view the $4,000 withdrawal as part of respondent's "race to the bank" (see Finding of Fact 4) and include it in the marital estate.

7. The parties own jointly the following shares of equity stock evaluated as of April 12, 1979:

Koppers Co.,	200 shares	$4,600
Diamond Shamrock,	150 shares	3,450
White Motor Co.,	60 shares	360
Total value:		$8,410

8. The parties jointly own $6,000 worth of Canadian bonds.

9. Petitioner and her three children jointly own $9,000 worth of Canadian bonds. At the time the bonds were purchased there was no intent on the part of the parties that a present gift to the children was being made. Principal purpose of the purchase in petitioner's name, together with the names of the children, was to avoid death taxes in the event the respondent was killed flying, yet to leave control in the petitioner until she died or made a gift of her interest to the children.

10. The life insurance interests of the parties are as follows:

Equitable Insurance Co., respondent owner, cash value, $8,067.75;

New York Life Insurance Co., respondent owner, cash value, $2,465.00;

National Service Life Insurance, cash value, $3,601, the full amount having been liquidated on September 28, 1978;

Fidelity Mutual Life Insurance Company:

Policy 965730, respondent owner, cash value, $1,285.43;

Policy 858127, petitioner owner, cash value, $2,251.95;

Policy 859116, respondent owner, as of August 13, 1979, the cash value was $9,007.28, it had a current dividend of $237.50, cash value on addi-

tional paid up insurance of $3,619.67 and an unearned premium of $313.60, for a total value of $13,178.05 with a total outstanding loan against it of $12,333.57 and interest due thereon of $219.32 for a total liability of $12,552.89 and a net value of $625.16;

Policy 971188, petitioner owner, cash value, $6,340.12, current dividend $95.50, cash value of paid up additional insurance $824.07 and unearned premium of $93.29, for a total value of $7,352.98 with a total loan outstanding of $6,941.00 and interest due thereon of $271.32 for a total liability of $7,212.32 and a net value of $140.66;

NOTE: Respondent is also co-owner of Fidelity Mutual policies 859118 and 859117 with Katheryn and Karyn Karr, daughters, respectively, but the Court was not informed as to the status or value of these policies.

NOTE: In response to a request made by respondent on May 31, 1979, Fidelity Mutual loaned $4,618 on policies 859116 and 971188 on June 8, 1979. There is no evidence as to when the other loan or loans against these policies were made or what the proceeds were used for.

11. The parties own jointly residential property at 427 Fairhills Drive, San Rafael, California, with a fair market value on April 12, 1979, (of $185,000).

12. The parties own jointly residential property in Stettler, Alberta, that had a fair market value on August 30, 1978 of ($26,000).

13. Petitioner and her son are joing owners of a building in Bounty, Saskatchewan worth $165.

14. Another building in Bounty worth $385 is in respondent's name.

Petitioner has some unspecified interest in a condominium at Big Sky, Montana which she purchased in January, 1977, for which she made a down payment of

$2,500 and on which she has been making payments of $82.00 per month. See Finding of Fact 4 for accounting of the $2,500.

16. It appears petitioner has a vehicle which she purchased for $4,000 in January of 1977. There is no evidence of depreciated value.

17. There is no substantial evidence as to the identification or value of the other personal property of the parties, which is spread from California to Saskatchewan in at least five or six place.

18. Respondent is the named beneficiary of a Canadian dental retirement fund worth $10,505.46 as of May 31, 1977. Part of the corpus of the fund derives from the transfer of a retirement fund accumulated by both parties while employed by the University of Alberta. The transfer to dental fund was to avoid income taxes on the University retirement fund. No evidence or law was submitted as to whether this fund is includable in the marital estate. In the absence of such a showing, and in view of the fact petitioner contributed to the fund itself, the fund will be included in the marital estate.

19. At the time of the dissolution, respondent was receiving $1,105 a month as Army retirement pay. He is 55 years old. It can be reasonably expected that in the normal course of events respondent will also have all rights in the Army's lifetime medical program and its commissary privileges. Petitioner will not share in either the pension or the medical or commissary benefits. There is no medical reason why he cannot be employed as either a dentist or pilot, both of which he is qualified to do, even though he has been rated 60% disabled for purposes of Army retirement. No good cause was shown for his being unemployed since the inception of this litigation.

20. Mr. Jon D. Wheeler, C.P.A., testified that the present value of a retirement plan is the amount of money it would require to be invested today to return a certain amount of money to an individual on an annuity basis for the rest of his life. Mr. Wheeler made a present value computation on a monthly income of $1,105 per month for a

male aged 55 and determined that the present value would be $355,896. In Mr. Wheeler making this computation he determined that a male aged 55 has a life expectancy of 21.7 years, said life expectancy determined from the Internal Revenue Service regulations for determining annuity values, he used an interest discount rate of 5.5%, based on interest rates paid by Helena banks, savings and loans, certificates of deposit for investment of $1,000 or less for a year or less, and he assumed a rate of inflation a semi-annual increase of 3.9%, which was the arithmetic average, unweighted, of the annual changes in the consumer price index in the last eight years. Mr. Wheeler further testified to the reasonableness of the 3.9% semi-annual increase by comparing it with the first available published rate change that was published according to the Civil Service Bulletin 831-77 which came out to be 3.9%, based on the June to December 1978 consumer price index change. He further testified that it would take $122,528 today to provide for a woman during her retirement years whose current age is 53, whose current monthly expenses are $800, who will retire at the age of 62, and whose monthly expenses will remain at $800 plus inflation between now and the age of retirement. Mr. Wheeler's computation included the rate of investment of 5.5% and further used the semi-annual inflation rate of 3.9% determined from above to the $800 between age 53 and age 69 with the result that at age 62 it will require $1,400 a month to replace the current $800 a month. Accordingly at age 62 she will receive $1,400 a month for her life expectancy, which life expectancy at the age of 62 is 20.3 years.

21. The three year record of this cause, which speaks eloquently for itself, convinces me beyond peradventure that the respondent is contemptuous of this Court and its officers as well as the laws of this state; that he will abide by the orders of this or any other court only when it is convenient, advantageous or inescapably necessary to do so. Mr. Karr is not the ordinary reluctant litigant. He is an embittered and resolute opponent of "the system," bent on defying and defeating it whenever and wherever possible and taking unscrupulous advantage of it when he can. It would therefore be futile, even specious, for this

Court to order him to do anything. There can be no scheduled payments, for the petitioner would have to obtain judgment for each one. There can be no division of property that would rely on his participation or cooperation because he would not give either. In view of this, the only realistic judgment this Court can render would be one for a lump sum judgment, knowing full well that even that will be avoided and evaded to the extent possible.

22. Petitioner is 53 years old and is employed at Carroll College as director of dental hygiene. She is ranked as an assistant professor and her take home pay, after deduction of $70 for retirement, taxes, Social Security and medical, is $961 per month for ten months of the year, or an average of approximately $800 per month for twelve months. She is employed on a yearly contract and does not have tenure. The teaching of dental hygiene at Carroll College could be discontinued in two years, in which case petitioner's employment there would be terminated. She cannot be promoted from assistant professor to full professor at Carroll College without the PhD degree. It would take four years of full-time application for petitioner to earn the PhD, at which time she would be looking for a job at the age of 57 or 58. She is able to teach but cannot operate as a dental hygienist because of a deteriorating arthritic condition in her hands.

23. Considering the age, health, station, prior, present and potential future occupation, vocational skills and employability of the parties, I would conclude that the respondent, as compared to petitioner, can earn and acquire capital assets, if he chooses to work, at a minimum ratio of 2 to 1, *with his present retirement income of $1,105 per month,* which is augmented by medical benefits and commissary privileges. (Emphasis added.)

24. Petitioner's monthly cost of living is as follows:

Rent	$245.00
Power	35.00
Telephone	50.00
Cleaning of clothes	6.00
Clothing allowance	70.00
Auto licenses	15.00

Recreation	50.00	
Auto repair and fuel ..	60.00	
Medical insurance ...	19.00	
Food	250.00	
Total	$800.00	per month. (Tr. 186)

25. Petitioner's attorney has expended a necessary 306½ hours and has billed her at the reasonable rate, considering skill, complexity and effectiveness of services rendered, at $42.21 per hour, for a total of $12,936, and his proven costs are $2,145.69. A very high percentage of this work and expenditure, perhaps 80%, would have been avoidable had a modicum of cooperation been extended by respondent. On the basis of the record to date it can be anticipated that many more hours and dollars will be expended before any recovery is effected. As noted, *the financial resources of the respondent*, including his earning capability and his pension, are far greater than those of the petitioner. (Emphasis added.)

26. Respondent was not in this jurisdiction on the day he was served with initial process in this case (5/31/77) because of the fraud and deceit of the petitioner. He was a resident of the state at the time by his own declaration, he had come to the state upon the accurate and truthful representation of petitioner that she was unable to control his son, and he was at the time taking care of his own and other family affairs.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the person and property of the parties for the purpose of determining judicially the division of their marital estate wherever that estate may be situated in accordance with MCA 40-4-202.

2. There is no rule of civil procedure that requires the Court to deem admitted such matters as might be requested to be stipulated in a pre-trial memorandum submitted after close of discovery and within fifteen days of the time set for trial, particularly when the party requesting the stipulation had been frustrating discovery of the very matters sought to be stipulated to for two years.

3. Neither the respondent's military retirement pay nor the proceeds of his National Service Life Insurance may be included in the marital estate. This conclusion is based on pre-emption and exclusion by the federal government in accordance with the reasoning set forth in *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1, applying to federal railroad retirement benefits, as it is now being extended in California by *Milhan v. Milhan* (1979) 158 Cal. Rep. 523, in the case of naval officers' retirement pay, and *In Re Marriage of Orr*, 95 Cal. App.3d 561, 157 Cal. Rptr. 301, in the case of Veterans Administration disability benefits, all of which militate and tend to reverse the contrary rule laid down in *In Re Marriage of Fithian* (1974) 111 Cal. Rptr. 369, 517 P2d 449.

4. The marital property to be divided consists of:

Real property located at 427 Fairhills Drive, San Rafael, California	$185,000.00
Real property located at Stettler, Alberta	26,000.00
Real property located in Bounty, Saskatchewan	550.00
Life insurance Equitable Insurance Co.,	8,067.75
N.Y. Life Insurance Co.,	2,465.00
Fidelity Mutual Life Insurance Co., Policy 965730	1,285.43
Policy 858127	2,251.95
Policy 859116	625.16
Policy 971188	140.66
Equity stock Koppers Co.	4,600.00
Diamond Shamrock	3,450.00
White Motor	360.00
Canadian dental retirement fund	10,505.00
Balance of proceeds from Wells Fargo bank account	10,089.00

Proceeds of deposit in Treasury Branch of The Province of Alberta	12,000.00
Proceeds of deposit in Royal Bank of Conquest	4,000.00
Canadian Bonds	15,000.00
TOTAL	$286,389.00

5. The marital property should be equitably apportioned between the parties in accordance with MCA 40-4-202 on a ratio of two-to-one for petitioner and respondent, respectively. In making this apportionment, the Court has considered the following factors:

A. This marriage lasted more than 31 years, more than half the lifetimes of the parties, petitioner being 53 and respondent being 55.

B. During the course of the marriage, all of the contributions of the parties, financial, physical, emotional, etc., when taken together must be deemed indistinguishable and therefore equal.

C. The age of the parties is, for any purpose related to this determination, equal.

D. They have become accustomed to a station in life that is essentially equal and to sustain it would take approximately the same income for each party.

E. Petitioner, occupied in a profession based primarily on hand work, has developing arthritis in her hands. Respondent, a professional pilot and a dentist, was discharged from the service rated 60% disabled because of tuberculosis. There is no evidence that this disability impaired his occupational ability prior to the onset of this litigation, and there is no evidence that this disability detracts from his employability or earning capacity for the future. The evidence as to the latter is, in fact, to the contrary.

F. Petitioner has a single source of income from a job of uncertain duration with a salary of $16,000 a year, and in which there is little reason-

able expectation of advancement. Respondent has a pension that provides him with $13,260 a year without working and can engage, without diminution of the pension, in the profession of dentistry or in commercial aviation. While no evidence was introduced as to how much dentists or pilots make, there is no legal requirement that Courts be born yesterday. I think it is not subject to reasonable dispute that dentists generally make a great deal more than their hygienists or more than assistant professors at Carroll College or more than $16,000 a year gross income. The same could reasonably be said of commercial pilots but, concededly, with not so much certainty. I conclude from this that respondent's ability and actual opportunity to earn and acquire capital assets is at least double that of the petitioner's.

G. There is no showing that the liabilities of the parties are distinguishable. There is a suggestion that they are jointly liable for $7,000 attorney fees due to a prior lawsuit in which they were co-defendants. Respondent may owe on the insurance policies, but if he does, the value of the policies have been reduced by the amount of the debt in determining the marital estate and, furthermore, there is no showing as to where the proceeds of the loans went—they may be available for repayment of the loan at the conclusion of this lawsuit.

H. *While the respondent's pension cannot be included in the marital property, or used as a set off, it can be considered as a source of income in arriving at the equitable apportionment required by the statute,* just as it may be used in determining alimony or maintenance. Eschenburg v. Eschenburg, 171 M 247; *Cromwell v. Cromwell,* 36 St. Rep. 60. *The federal law may hold our wrist from reaching into respondent's retirement salary, but it need not blind our eyes to the reality of the situation. Respondent has a*

> *comfortable, secure retirement income, in being, for the rest of his life. Petitioner, although she contributed as much to it as he did, will never receive a cent of it.* After respondent had begun enjoying his retirement income the petitioner was forced to begin a retirement program of her own, at the age of 50, with an organization from which she could be dismissed, without fault on her part, next year. She has, in a word, a very small retirement fund at present and virtually no retirement security. (Emphasis added.)

Due to diversity, diversion, dispersion, difficulty of division and inaccessibility of the marital property, distribution by parcel is not feasible. The only practical and enforceable method of division is to award judgment to petitioner in a lump sum, require her to deliver to the Court, in escrow, all indicia of title she may have to be transferred or conveyed to respondent upon satisfaction of the judgment. Judgment should therefore be entered requiring the respondent to pay to petitioner $190,926 as for her portion of the marital estate and an additional $15,081.69 as and for attorney's fees for a total of $206,007.69, and requiring petitioner to submit to the Court all indicia of title she may have to property in the marital estate.

Dated this 26th day of February, 1980.

ss/Gordon R. Bennett
District Judge

APPENDIX C

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS & CLARK.

IN RE THE MARRIAGE OF:
JOANNE D. KARR,
Petitioner,
and
JAMES H. KARR,
Respondent.

No.41340

JUDGMENT

The property disposition in this cause came on regularly for trial before the Court sitting without a jury on April 12 and 13, 1979 and August 14, 1979, with James L. Norris appearing as attorney for Petitioner and Robert Emmons appearing as attorney for Respondent, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and having filed its Findings of Fact and Conclusions of Law on February 26, 1980, and having directed that judgment be entered in accordance therewith,

NOW, THEREFORE, by reason of Findings of Fact and Conclusions of Law,

IT IS ORDERED, ADJUDGED AND DECREED:

That Petitioner have judgment against Respondent in the sum of $190,926 as and for her portion of the marital estate and an additional $15,081.69 as and for attorney's fees for a total of $206,007.69 with interest thereon at the rate of six percent (6%) per annum from the date hereof until paid, and Petitioner is required to submit to the Court all indicia of title she may have to property in the marital estate.

DATED this 28th day of February, 1980.

ss/Gordon R. Bennett
District Judge

APPENDIX D

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS & CLARK.

IN RE THE MARRIAGE OF:
JOANNE D. KARR,
Petitioner,
and
JAMES H. KARR,
Respondent.

No. 41340

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN by JAMES H. KARR, the Respondent above named, hereby appeals to the Supreme Court of the State of Montana from the final judgment entered in this action on the 28th day of February, 1980. This is the judgment for $190,926.00 and $15,081.69.

NOTICE IS HEREBY GIVEN by JAMES H. KARR, the Respondent above named, hereby appeals to the Supreme Court of the State of Montana from the final judgment entered in this action on the 28th day of February, 1980. This is the judgment for $2,000.00.

DATED this 7th day of May, 1980.

ROBERT J. EMMONS
407 Strain Building
Great Falls, Montana 59401
Attorney for Respondent

By: /s/ Robert J. Emmons
ROBERT J. EMMONS

CC: Thomas J. Kearney,
Clerk of Montana Supreme Court

James Norris, Attorney for Petitioner

APPENDIX E

No. 80-177

IN THE

Supreme Court of the State of Montana

IN RE THE MARRIAGE OF:
JOANNE D. KARR,
Petitioner, Respondent and Cross-Appellant,

vs.

JAMES H. KARR,
Respondent, Appellant and Cross-Respondent.

PETITION FOR REHEARING IN THE MONTANA SUPREME COURT

> "The disability pension was used as an offset by the District Court and this fact cannot be ignored by stating that the pension was not directly affected. Under the Supremacy clause, infra, the trial court could not do indirectly what it could not do directly, i.e., divide the military pension. The trial court divested Mr. Karr of all his marital assets because he had the military disability pension and it was used as an offset for the marital division." (P.3)
>
> * * * * *
>
> "2. Article VI, Paragraph 2 of the United States Constitution was overlooked by this Court in its opinion and the following portion of this Court's opinion violates Article VI, Paragraph 2, where this Court stated:
>
> "... We hold it proper, and in harmony with the principles of equity, that the District Court

> consider the income from a party's federal military retirement pension, earned during the marriage, in arriving at an equitable apportionment on the marital assets, particularly when the District Court is considering the statutory factor of the parties opportunity for future acquisition of capital assets and income." (Page 11 of this Court's Opinion).

The Court has cited *Eschenburg v. Eschenburg*, 171 Mont. 247, 252, 557 P.2d 1014, 1016 (1976), when the Court did not consider the Supremacy clause in *Eschenburg*.

3. The Court has overlooked the fact, repeatedly presented by Petitioner, and the law applicable thereto, that the military pension is a privilege created under the laws of the United States, and is subject to the immunities provided by such laws, and exists because of Petitioner's commission as an officer in the United States armed forces, and, therefore, all rights or obligations under such pension must be treated in accordance with the Federal Law.

4. For all the reasons stated, the Court has incorrectly applied the law in failing to apply the cases requiring a decision that the Federal laws relating to military pensions have preempted the field and that a state court decision contrary to such Federal laws is invalid and without force or effect. The disability pension of Mr. Karr cannot be considered either directly or indirectly in dividing the marital assets and to do so, either directly or indirectly, violates the Supremacy clause of the United States Constitution, supra. The opinion of this Court is in direct contravention of *Hisquierdo v. Hisquierdo*, 59 L.Ed.2d 1 (U.S. 1979), by offsetting the pension of Mr. Karr and awarding Mrs. Karr marital assets 2 to 1 in her favor in order to provide her with an annuity equal to the disability pension of Mr. Karr." (P.4)

APPENDIX F

STATE of MONTANA
OFFICE OF THE CLERK

SUPREME COURT

Helena, Montana
May 28, 1981

THOMAS J. KEARNEY, Clerk

Clara Gilreath
Clerk of District Court
Helena, Montana 59601

RE: No. 80-177, D.C. No. 41340, *KARR vs. KARR*

Dear Mrs. Gilreath:

Enclosed please find remittitur and a copy of the Opinion in the above-entitled cause.

Best personal regards.

Very truly yours,
Thomas J. Kearney
Clerk of Supreme Court

Enclosure
cc: Robert J. Emmons
James L. Norris

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 80-177

IN RE THE MARRIAGE OF:

JOANNE D. KARR,

Petitioner, Respondent and Cross-Appellant,

vs.

JAMES H. KARR,

Respondent, Appellant and Cross-Respondent.

ORDER

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

DATED this 28th day of May, 1981.

Frank I Haswell
Chief Justice

John Conway Harrison
Daniel J. Shea
John C. Sheehy
Justices

APPENDIX G

APPLICABLE FEDERAL STATUTES:

a. 10 U.S.C., §1201:

"Regulars and members on active duty for more than 30 days: retirement

"Upon a determination by the Secretary concerned that a member of a regular component of the armed forces entitled to basic pay, or any other member of the armed forces entitled to basic pay who has been called or ordered to active duty (other than for training under section 270(b) of this title) for a period of more than 30 days, is unfit to perform the duties of his office, grade, rank, or rating because of physical disability incurred while entitled to basic pay, the Secretary may retire the member, with retired pay computed under section 1401 of this title, if the Secretary also determines that—

(1) based upon accepted medical principles, the disability is of a permanent nature;

(2) the disabilityis not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and

(3) either—

(A) the member has at least 20 years of service computed under section 1208 of this title; or

(B) the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Veterans' Administration at the time of the determination; and either—

(i) the member has at least eight years of service computed under section 1208 of this title;

(ii) the disability is the proximate result of

performing active duty; or

(iii) the disability was incurred in line of duty in time of war or national emergency."

b. 10 U.S.C., §1401:

"Computation of retired pay:

"The monthly retired pay of a person entitled thereto under this subtitle (10 USCS §§101 *et seq.*) is computed according to the following table. For each case covered by a section of this title (10 USCS §§1 *et seq.*) named in the column headed 'For sections', retired pay is computed by taking, in order, the steps prescribed opposite it in columns 1, 2, 3 and 4, as modified by the applicable footnotes. However, if a person would otherwise be entitled to retired pay computed under more than one pay formula of this table or of any other provision of law, he is entitled to be paid under the applicable formula that is most favorable to him. Section references below are to sections of this title (10 USCS §§1 *et. seq.*). (Tables omitted)."

c. 10 U.S.C., §1403:

"Disability retired pay: treatment under title 26

"That part of the retired pay of a member of an armed force, computed under formula No. 1 or 2 of section 1401, or under section 1402(d) or 1402a(d), of this title on the basis of years of service, which exceeds the retired pay that he would receive if it were computed on the basis of percentage of disability is not considered as a pension, annuity, or similar allowance for personal injury, or sickness, resulting from active service in the armed forces, under section 104(a) of title 26."

As amended Sept. 8, 1980, Pub.L. 96-342, Title VIII, § 813(b) (3) (C), 94 Stat. 1104.

d. 26 U.S.C. §104

"Compensation for injuries or sickness

"(a) In general.—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include:

(4) amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country or in the Coast and Geodetic Survey or the Public Health Service, or as a disability annuity payable under the provisions of section 808 of the Foreign Service Act of 1980;"

e. 38 U.S.C. §3101

"Nonassignability and exempt status of benefits

"(a) Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arixing under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title, or of servicemen's indemnity. For the purposes of this subsection, in any case where a payee of an educational assistance allowance has designated the address of an attorney-in-fact as the

payee's address for the purpose of receiving his or her benefit check and has also executed a power of attorney giving the attorney-in-fact authority to negotiate such benefit check, such action shall be deemed to be an assignment and is prohibited.

* * *

(d) In the case of a person who—

(1) has been determined to be eligible to receive pension or compensation under laws administered by the Veterans' Administration but for the receipt by such person of pay pursuant to any provision of law providing retired or retirement pay to members or former members of the Armed Forces or commissioned officers of the National Oceanic and Atmospheric Administration or of the Public Health Service; and

(2) files a waiver of such pay in accordance with section 3105 of this title in the amount of such pension or compensation before the end of the one-year period beginning on the date such person is notified by the Veterans' Administration of such person's eligibility for such pension or compensation,

the retired or retirement pay of such person shall be exempt from taxation, as provided in subsection (a) of this section, in an amount equal to the amount of pension or compensation which would have been paid to such person but for the receipt by such person of such pay."

f. **38 U.S.C. §3105**

"Waiver of retired pay

"Any person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, or as a commissioned officer of the National Oceanic and Atmospheric Administration or of the Public

Health Service, and who would be eligible to receive pension or compensation under the laws administered by the Veterans' Administration if he were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such retired or retirement pay is paid of a waiver of so much of his retired or retirement pay as is equal in amount to such pension or compensation. To prevent duplication of payments, the department with which any such waiver is filed shall notify the Veterans' Administration of the receipt of such waiver, the amount waived, and the effective date of the reduction in retired or retirement pay."

APPLICABLE MONTANA STATUTES:

Sec. 40-4-102 M.C.A.

"Uniformity of application and construction

"This chapter shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among those states which enact it."

Sec. 40-2-206 M.C.A.

"Same—when separated

"The earnings and accumulations of a married person and of his minor children living with him or in his custody, while he is living separate from his spouse, are the individual property of such person except that, to the extent that a mutual duty of support between the husband and wife as established by 40-2-102 still exists, such earnings and accumulations are liable for debts incurred for necessary articles procured for the use and benefit of the married person, his spouse, or minor children."

Sec. 40-4-202 M.C.A.

"Disposition of property

"(1) In a proceeding for dissolution of a marriage, legal separation, or disposition of property following a decree of dissolution of marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, without regard to marital misconduct, shall, and in a proceeding for legal separation may, finally equitably apportion between the parties the property and assets belonging to either or both, however and whenever acquired and whether the title thereto is in the name of the husband or wife or both. In making apportionment, the court shall consider the duration of the marriage and prior marriage of either party; antenuptial agreement of the parties; the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties; custodial provisions; whether the apportionment is in lieu of or in addition to maintenance; *and the opportunity of each for future acquisition of capital assets and income.* The court shall also consider the contribution or dissipation of value of the respective estates and the contribution of a spouse as a homemaker or to the family unit. In disposing of property acquired prior to the marriage; property acquired by gift, bequest, devise, or descent; property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent; the increased value of property acquired prior to marriage; and property acquired by a spouse after a decree of legal separation, the court shall consider those contributions of the other spouse to the marriage, including:

(a) the nonmonetary contribution of a homemaker;

(b) the extent to which such contributions have facilitated the maintenance of this property; and

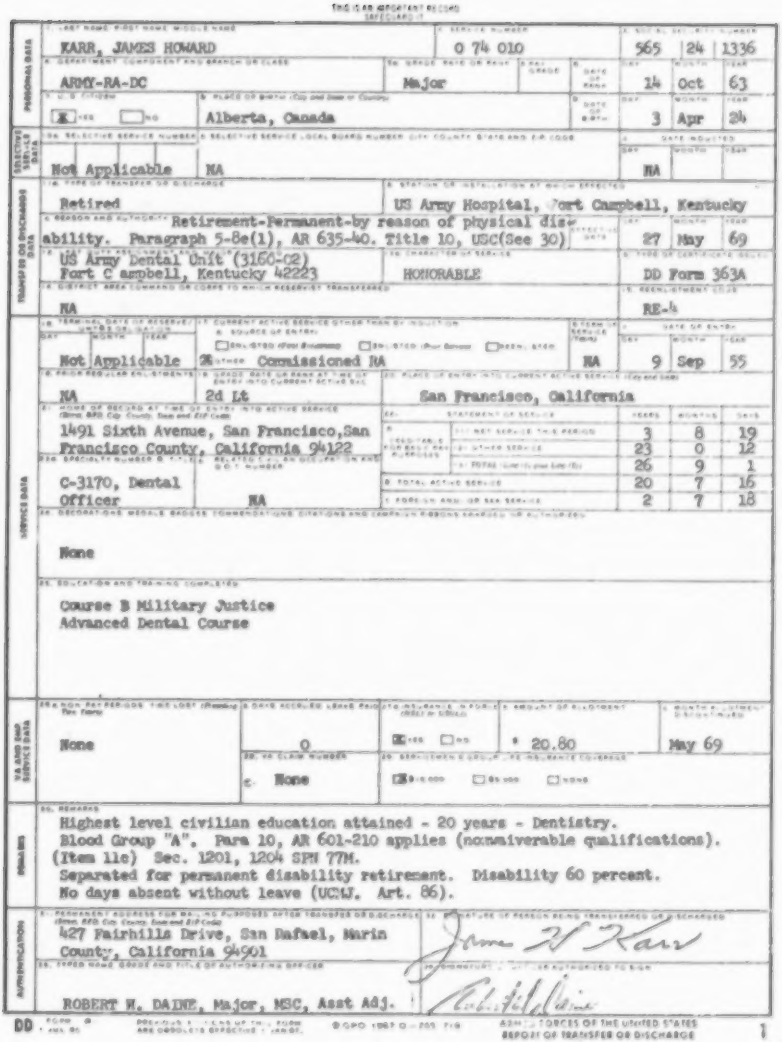
(c) whether or not the property disposition serves as an alternative to maintenance arrangements.

(2) In a proceeding, the court may protect and promote the best interests of the children by setting aside a portion of the jointly and separately held estates of the parties in a separate fund or trust for the support, maintenance, education, and general welfare of any minor, dependent, or incompetent children of the parties."

UNITED STATES CONSTITUTION, ARTICLE VI, CLAUSE 2:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States shall be the Supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

APPENDIX H



THIS IS AN IMPORTANT RECORD. SAFEGUARD IT

PERSONAL DATA

1. LAST NAME - FIRST NAME - MIDDLE NAME: KARR, JAMES HOWARD
2. SERVICE NUMBER: 0 74 010
3. SOCIAL SECURITY NUMBER: 565 | 24 | 1336
4. DEPARTMENT, COMPONENT AND BRANCH OR CLASS: ARMY-RA-DC
5a. GRADE, RATE OR RANK: Major
5b. PAY GRADE:
5c. DATE OF RANK: 14 Oct 63
6. a. YES [X] b. NO [ ]
6b. PLACE OF BIRTH (City and State or Country): Alberta, Canada
6c. DATE OF BIRTH: 3 Apr 24

SELECTIVE SERVICE DATA

7a. SELECTIVE SERVICE NUMBER: Not Applicable
7b. SELECTIVE SERVICE LOCAL BOARD NUMBER (City, County, State and ZIP Code): NA
7c. DATE MAILED: NA

TRANSFER OR DISCHARGE DATA

8a. TYPE OF TRANSFER OR DISCHARGE: Retired
8b. STATION OR INSTALLATION AT WHICH EFFECTED: US Army Hospital, Fort Campbell, Kentucky
9. REASON AND AUTHORITY: Retirement-Permanent-by reason of physical disability. Paragraph 5-8e(1), AR 635-40. Title 10, USC(See 30)
9a. EFFECTIVE DATE: 27 May 69
10. a. US Army Dental Unit (3160-02) Fort Campbell, Kentucky 42223
10b. CHARACTER OF SERVICE: HONORABLE
10c. TYPE OF CERTIFICATE ISSUED: DD Form 363A
11. a. DISTRICT AREA COMMAND OR CORPS TO WHICH RESERVIST TRANSFERRED: NA
11b. REENLISTMENT CODE: RE-4

SERVICE DATA

12a. TERMINAL DATE OF RESERVE OBLIGATION THIS PERIOD: Not Applicable
12b. CURRENT ACTIVE SERVICE OTHER THAN BY INDUCTION: [ ] REGULAR [ ] RESERVE [ ] NATIONAL GUARD
12c. SOURCE OF ENTRY: [ ] ENLISTED [ ] APPOINTED [ ] COMMISSIONED [ ] ENLISTED
12d. TERM OF SERVICE (Years): NA
13. DATE OF ENTRY: 9 Sep 55
14. PRIOR REGULAR ENLISTMENTS: NA
15. GRADE, RATE OR RANK AT TIME OF ENTRY INTO CURRENT ACTIVE SERVICE: 2d Lt
16. PLACE OF ENTRY INTO CURRENT ACTIVE SERVICE (City and State): San Francisco, California
17. HOME OF RECORD AT TIME OF ENTRY INTO ACTIVE SERVICE (Street, RFD, City, County, State and ZIP Code): 1491 Sixth Avenue, San Francisco, San Francisco County, California 94122
18. SPECIALTY NUMBER & TITLE: C-3170, Dental Officer
19. RELATED CIVILIAN OCCUPATION & D.O.T. NUMBER: NA

20. STATEMENT OF SERVICE	YEARS	MONTHS	DAYS
a. NET SERVICE THIS PERIOD	3	8	19
b. OTHER SERVICE	23	0	12
c. TOTAL (Items a plus b)	26	9	1
d. TOTAL ACTIVE SERVICE	20	7	16
e. FOREIGN AND/OR SEA SERVICE	2	7	18

21. DECORATIONS, MEDALS, BADGES, COMMENDATIONS, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED: None
22. EDUCATION AND TRAINING COMPLETED: Course B Military Justice
Advanced Dental Course

VA AND DAC SERVICE DATA

23. NON-PAY PERIODS THIS LOST (Months, Days): None
24. DATE ACCRUED LEAVE PAID: 0
25. a. YES [X] b. NO [ ]
26. AMOUNT OF ALLOTMENT: $ 20.80
27. MONTH ALLOTMENT DISCONTINUED: May 69
28. VA CLAIM NUMBER: c. None
29. DEPENDENTS ON FILE: a. YES [X] b. NO [ ] c. NONE [ ]

REMARKS

30. REMARKS
Highest level civilian education attained - 20 years - Dentistry.
Blood Group "A". Para 10, AR 601-210 applies (nonwaiverable qualifications).
(Item 11e) Sec. 1201, 1204 SPN 77M.
Separated for permanent disability retirement. Disability 60 percent.
No days absent without leave (UCMJ. Art. 86).

AUTHENTICATION

31. PERMANENT ADDRESS FOR MAILING PURPOSES AFTER TRANSFER OR DISCHARGE (Number, Street, RFD, City, County, State and ZIP Code): 427 Fairhills Drive, San Rafael, Marin County, California 94901
32. SIGNATURE OF PERSON BEING TRANSFERRED OR DISCHARGED: James H Karr
33. TYPED NAME, GRADE AND TITLE OF AUTHORIZING OFFICER: ROBERT W. DAINE, Major, MSC, Asst Adj.
34. SIGNATURE OF OFFICER AUTHORIZED TO SIGN: Robert W. Daine

DD FORM 1 1 JUL 62 — PREVIOUS EDITIONS OF THIS FORM ARE OBSOLETE EFFECTIVE 1 JAN 63. — O GPO 1967 O—255 718 — ARMED FORCES OF THE UNITED STATES REPORT OF TRANSFER OR DISCHARGE

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APPENDIX I

PETITIONER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT OF JAMES H. KARR—EXCERPTS

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

IN RE THE MARRIAGE OF:
JOANNE D. KARR,
Petitioner,
and
JAMES H. KARR,
Respondent.

EXCERPTS OF PETITIONER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT OF JAMES H. KARR

CAUSE NO. 41340

* * * * * * * * * * * * * * * * * * *

"Military retirement benefits are not marital property that can be divided by the Court. On this basis alone, Mrs. Karr has no claim to any of the military retirement benefits of Mr. Karr.

"A further and distinct reason why Mrs. Karr cannot legally claim any right to the retirement benefits of Mr. Karr is that his benefits are for a tubercular disability incurred by him in the military service. He was separated from the service based on a permanent disability of sixty percent (60%). His retirement was made under 10 U.S.C. §§ 1201(1) and (3)(B)(i)(ii). Special tax treatment is afforded to a disabled retired military person by 10 U.S.C. §1403 and 26 U.S.C. §104(a). In 1976, James Karr received $13,231.00 in gross income with only $1,470.16 subject to tax. Thus, only eleven percent (11%) of Mr. Karr's disability benefits are taxable. This means eighty-nine percent (89%) of Mr. Karr's payments are solely attribu-

table to his disability. The Social Security Act, 424 U.S.C. §659, allows attachment of military benefits for child support or alimony, it does not allow attachment for "... any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." (42 U.S.C. §662(c)). Mrs. Karr's claim for a division of the military benefits is not a claim for alimony but a claim that the benefits are marital property. Congress made the disability benefits, like railroad benefits, free from the community property or equitable distribution claims of spouses." (P.31)

* * * * *

"The rationale applied in *Hisquierdo -v- Hisquierdo*, 59 L.Ed. 2d 1 (Jan. 1979) to Railroad Retirement Benefits is equally appliable to the disability benefits received by Mr. Karr." (P.32)

* * * * *

"*Hisquierdo* considered the effect of awarding the wife a percentage of the benefits as they were received by the husband. It referred to the exemption of railroad retirement benefits from State or Federal tax (P.11-12). (Mr. Karr's income is 89% non-taxable.) The Court stated the Congress had fixed the amount "... thought appropriate to support an employee's old age and to encourage the employee to retire ..." (Mr. Karr's benefits are based on his disability and his inability to adequately provide for himself. The disability is not geared to the disabled veteran having any dependents, spouse or children. The fund is to assist him due to his disability).

Hisquierdo considered awarding the wife other property to compensate her for her husband's railroad benefits. The Court left no doubt this could not be done. In *Hisquierdo*, the Court said:

> "... As petitioner's counsel bluntly put it, respondent wants the house ..." (P.15) (P.33)

"Mr. Karr, as in *Hisquierdo:*

(1) Has no right to "anticipate" benefits. In

fact, his claim for benefits cease on his death. There is no statutory basis that permits Mr. Karr to take a lump-sum in settlement of future payments. The absence of a no anticipation clause in the military retirement act does not grant such a right.

(2) If Mrs. Karr were to receive all the real and personal property as an offset against the retirement benefits, Mr. Karr would have nothing for his children whom he obviously greatly regards. On his death, all benefits cease.

(3) Congress could reduce the benefits after the division of property in this case and Mr. Karr would be further penalized.

(4) Retirement benefits convey no future right. However, offsetting property against the retirement benefits with a possibility the benefits may terminate shortly, would render a windfall to Mrs. Karr by the Court considering these benefits will be paid for 21.7 years to Mr. Karr, his life expectancy." (P.34)

* * * * *

"The disability retirement benefits of Mr. Karr are not marital property subject to division by this Court. Nor can this Court award Mrs. Karr property to offset the disability benefits of Mr. Karr. To regard the benefits as marital property or to award offsetting property would violate the Congressional intent on military disability benefits and the Supremacy Clause of the United States Constitution. This Court has no jurisdiction over the disability benefits of Mr. Karr." (P.35,36)

* * * * *

"5. The claim of Mrs. Karr to equitably divide the military disability benefits received monthly by Mr. Karr is denied. These benefits are not marital property and are

not subject to division by this Court. Mrs. Karr has no right, title, interest or claim to these benefits." (P.38,39)

/s/ ROBERT J. EMMONS
Counsel for James H. Karr

APPENDIX J

RESPONDENT'S RULE 52, M.R.Civ.P. MOTIONS

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

IN RE THE MARRIAGE OF:
JOANNE D. KARR,
Petitioner,
and
JAMES H. KARR,
Respondent.

CAUSE NO. 41340

The Court's Findings of Fact No. 20 restated the testimony of Jon D. Wheeler, C.P.A.

All of Paragraph 20 should be stricken on the grounds it is irrelevant, immaterial and speculative.

OBJECTION:

The "hypothetical" for a male, age 55, with an income of $1,105.00 per month is Mr. Karr. This reduction to present value for this income being $355,896.00 is speculative when applied to Mr. Karr because on his death, his pension ceases. He does not have $355,896.00 in capital assets to acquire that income. Mr. Karr expended twenty years of his life already for the pension and placing a value of $355,896.00 does not place that sum in his hands to be disposed of by Mr. Karr to purchase or pay-off Mrs. Karr's interest in any marital property.

OBJECTION:

The $122,528 figure to provide Mrs. Karr an income of $800.00 ($1,400.00 with inflation) at age 62 for her life expectancy of twenty years is also speculative, immaterial

and irrelevant. The Court is utilizing this as a basis to fund Mrs. Karr's retirement by awarding her $190,926.00 from the marital estate. This is an indirect approach by the Court to award Mrs. Karr a part of or the equivalent of Mr. Karr's military retirement benefits and is prohibited by *Hisquierdo -v- Hisquierdo*, 439 U.S. 572, 99 S.CT. 802, 59 L.Ed.2d 1; *Milhan -v- Milhan*, 158 Cal.Rep. 523; and In Re Marriage of Orr, 95 Cal.Appl3d 561, 157 Cal.Rep. 301. The principal asset is the residence in California value at $185,000.00. It is not a mere coincidence that this value is only $5,926.00 less than the $190,926.00 awarded to Mrs. Karr by the Court on the basis of 2 to 1 in marital assets. Further, the award of $190,926.00 is a direct form of maintenance and the Court has not awarded Mrs. Karr maintenance.

This Finding should be amended by adopting Mr. Karr's Proposed Findings of Fact No. 28." &Para. 2, P.3,4)

/s/ ROBERT J. EMMONS
Counsel for James H. Karr

APPENDIX K

No. 80-177

IN THE

Supreme Court of the State of Montana

IN RE THE MARRIAGE OF:
JOANNE D. KARR,

Petitioner, Respondent and Cross-Appellant,

vs.

JAMES H. KARR,

Respondent, Appellant and Cross-Respondent.

SPECIFICATION OF ERRORS IN PETITIONER'S BRIEF TO THE MONTANA SUPREME COURT—EXCERPTS

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The questions presented by the Appellant, JAMES H. KARR, are as follows:

1. Did the Trial Court err in dividing the marital assets on the ratio of 2 to 1 in favor of Mrs. Karr?

Under this general issue may be grouped certain questions.

A. Is the 60% disability pension of Mr. Karr which is only taxed 11% of his $1,100 monthly income, a marital asset subject to division by the Court?

B. *Can the 60% disability pension of Mr. Karr be directly or indirectly considered by the Court in dividing the marital assets?*

C. Did the trial court violate Article VI, Clause 2 of the U.S. Constitution by directly or indirectly considering the disability pension in dividing the marital assets 2 to 1 in favor of Mrs. Karr? (Emphasis added.)

APPENDIX L

APPLICABLE PORTION OF RULE 34, MONTANA RULES OF APPELLATE CIVIL PROCEDURE

"When in appeals or special proceedings, it is ordered that remittitur ... or judgment issue forthwith, no petition for rehearing will be entertained. In all other cases a petition for rehearing may be filed within 10 days after the decision of the Supreme Court has been rendered, unless the time is shortened or enlarged by order ..."

APPLICABLE PORTION OF RULE 35, MONTANA RULES OF APPELLATE CIVIL PROCEDURE

"(b) Remittitur may, in cases where it is deemed proper, be ordered forthwith; otherwise the same shall be issued promptly upon expiration of time for filing petition for rehearing, or, if such petition is filed, then upon denial thereof ..."

APPENDIX M

RESPONDENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT— EXCERPTS

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

IN RE THE MARRIAGE OF
JOANNE D. KARR,
Petitioner,
and
JAMES H. KARR,
Respondent.

JOANNE D. KARR'S
PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND JUDGMENT

CAUSE NO. 91340

* * * * * * * * * * *

FINDINGS OF FACT

* * * * * * * * * * *

"In considering the duration of the marriage of the parties, their ages, health, station in life, occupation, amount and source of income, employability, estate, liabilities and needs of the parties, all pursuant to Section 40-40202, MCA 1979, the Court finds that an equitable apportionment of the property is approximately one-half to each. *Accordingly, Petitioner is awarded $343,111.26 and Respondent $355,896.00. Since the military retirement is valued at $355,896.00 the Respondent is awarded the balance of the property.* If Respondent appears before this Court he will be ordered to sign the appropriate deeds and other documents necessary to facilitate their transfer and a money judgment for the balance not so transferred, but if he should not appear, then Petitioner is entitled to a

money judgment of $343,111.26. In addition, Petitioner is entitled to her attorneys' fees of $15,081.69 be paid by Respondent." (Para. LXXIX, P.21)

* * * * *

"*That Respondent is awarded the military retirement and Petitioner is awarded the balance of the parties' net worth.* If Respondent appears before this Court for a final hearing on this matter, he will be ordered to execute the proper deeds to the real properties listed above, to execute proper documents to any and all of the other property or Petitioner is entitled to a money judgment for the balance plus payment of her reasonable attorney's fees of $15,081.69. Should Respondent not appear before this Court again, then, in that event, Petitioner is entitled to a money judgment in the amount of $343,111.26 plus $15,081.69 for attorney's fees.

Wherefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That Respondent is awarded the military retirement and Petitioner is awarded the balance of the parties' net worth. If Respondent appears before this Court for a final hearing on this matter, he will be ordered to execute the proper deeds to the real properties listed above, to execute proper documents to any and all of the other property or Petitioner is entitled a money judgment for the balance plus payment of her reasonable attorney's fees of $15,081.69. Should Respondent not appear before this Court again, then, in that event, Petitioner is entitled to a money judgment in the amount of $343,111.26 plus $15,081.69 for attorney's fees." (Para. 4, P.22) (Emphasis added.)

/s/ JAMES L. NORRIS
Counsel for Joanne D. Karr

APPENDIX N

RESPONDENT'S SPECIFICATION OF ERROR IN MONTANA SUPREME COURT AND EXCERPT OF ARGUMENT

No. 80-177

IN THE

Supreme Court of the State of Montana

IN RE THE MARRIAGE OF:
JOANNE D. KARR,
Petitioner, Respondent and Cross-Appellant,

vs.

JAMES H. KARR,
Respondent, Appellant and Cross-Respondent.

CROSS—APPELLANT'S OPENING BRIEF

STATEMENT OF THE ISSUE

Whether the District Court erred in not including the military retirement of James H. Karr as a marital asset for purposes of equitable apportionment of the marital property between the parties.

"According to this Court's decision in *Miller v. Miller, supra,* and *McGill v. McGill, supra,* the present value of the husband's military retirement, $355,896, should be included as a marital asset of the parties with the result that total marital assets should be $645,285. ($289,389 so concluded by the District Court plus the present value of $355,896 of the husband's military retirement) Relying on the District Court's Finding of Fact No. 23, page 10, and its Conclusion of Law No. 5, page 13, the wife's equitable share of the marital assets is on the basis of two for one, or $430,190. On this basis the wife would be entitled to an increased judgment of $239,264 (the difference between $430,190 and the District Court's conclusion of $190,926).

In the alternative the wife requests an award of $322,642.50, or one-half of the marital assets of $645,285 ..." (P.5)

* * * * *

"The wife should not be denied an equitable apportionment of the husband's military retirement simply because the District Court made a mistake in its conclusion of law as to what Montana law is relative to a military retirement being a marital asset. This Court's decision in *Miller v. Miller, supra,* requires that the wife receive an increased award since the military retirement is a marital asset." (P.7)

Opposition

Office - Supreme Court, U.S.
FILED
SEP 22 1981
ALEXANDER L. STEVAS
CLERK

No. 81-363

IN THE

Supreme Court of the United States

October Term, 1981

James H. Karr, Petitioner,

v.

Joanne D. Karr, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

RESPONDENT'S BRIEF IN OPPOSITION

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NO. 81-363

IN THE

Supreme Court of the United States

October Term, 1981

James H. Karr, Petitioner,

v.

Joanne D. Karr, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Joanne D. Karr, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Montana Supreme Court's opinion in this case. That opinion is reported at _____Mont._____, 628 P.2d 267 (1981)

OBJECTIONS TO STATEMENT OF THE CASE

Respondent objects to a portion of the petitioner's statement of the case (p. 3) where it is stated that in 1979 Mr. Karr elected to have his military benefits administered by the Veterans' Administration. This "election" in 1979 by Mr. Karr had not occurred by the date of the decree dissolving the marriage on October

6, 1977. Petitioner cannot better his position by post-decree action, since the property disposition is controlled by the facts existing on the date of the decree of dissolution. This attempt by petitioner was rejected by the Montana Supreme Court and is accordingly not a proper element in a statement of the case.

Additionally, respondent objects to the petitioner's assertion, (p. 6) that the Montana Supreme Court held that the wife was entitled to her lump sum award "to provide her with a like retirement source...." The Montana Supreme Court did not conclude that the award was solely and exclusively to provide the wife with a possible retirement source. While this may have been a consideration by the Montana District Court, though not expressly stated, the Montana Supreme Court concluded it may have been one of the considerations of the District Court. _____Mont. at _____, 628 P.2d at 272. Considering it as one factor in the Court's deliberations is a far cry from implying that it was the sole reason for the award.

REASONS WHY THE WRIT SHOULD BE DENIED

1. *Neither the decision below nor the record raises the Question Presented in this petition.*

The sole Question Presented in the petition is whether a military retirement can be considered by a Montana court in arriving at an equitable apportionment of marital assets in a divorce. This issue raises a constitutional challenge to M.C.A. § 40-4-202 (1979), a challenge which petitioner failed to raise in either the Montana District Court or the Montana Supreme Court.

The issues raised by petitioner below were (1) whether his military retirement was "marital property", (2) whether the award was an offset of marital property and (3) whether the District Court abused its

discretion is awarding respondent $190,926. These issues were limited to consideration of whether respondent's military retirement is "property and assets" within the meaning of M.C.A. § 40-4-202. This limited presentation below apparently was because this Court had not yet handed down *McCarty v. McCarty*, _____U.S._____, 101 S.Ct. 2728 (1981).

By this petition, petitioner now seeks to challenge the constitutionality of M.C.A. § 40-4-202, which requires a Montana court in apportioning the marital property and assets belonging to either or both spouses to

> *consider* the duration of the marriage and prior marriage of either party; antenuptial agreement of the parties; the ages, health, station, occupation, *amount and sources of income*, vocational skill, *employability, estate*, liabilities, and *needs of each of the parties;* custodial provisions; whether the apportionment is in lieu of or in addition to maintenance; *and the opportunity of each for future acquisition of capital assets and income.* (Emphasis added.)

While petitioner has not denominated his issue a constitutional challenge, his only objective is to have this Court declare that M.C.A. § 40-4-202 is pre-empted and thus unconstitutional in the wake of this Court's decisions in *McCarty, supra* and *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979).

In *McCarty, supra* at 2734, this Court noted that Mrs. McCarty challenged her husband's failure to question the constitutionality of any statute at issue in the California courts. This Court noted that the issue of pre-emption of the state community property laws had been raised in the California courts and that obser-

vation was the predicate for your holding on this issue. "[T]he application of community property law conflicts with the federal military scheme regardless of whether retired pay is defined as current or as deferred compensation. *Id* at 2736".

In his arguments to the Montana Supreme Court, petitioner addressed only the questions of whether a military retirement is marital property and whether the District Court properly exercised its discretion by indirectly granting Mrs. Karr a portion of petitioner's military retirement. On page 16 of petitioner's opening briefs to the Montana Supreme Court, he stated the issue to be whether "THE COURT ABUSED ITS DISCRETION BY DIVIDING THE MARITAL ASSETS ON THE RATIO OF 2 TO 1 IN FAVOR OF MRS. KARR." Thus in the Montana courts, petitioner argued the issues were restricted to property and an attack on the District Court's exercise of discretion, rather than an attack on the district court's powers created in M.C.A § 40-4-202.

Petitioner did argue in constitutional terms in the Montana courts that a military retirement is not a marital asset and that an offset was indirectly an award of marital property. It is important to note, however, that this attack was limited to the question of whether the military retirement was "property" within the meaning of M.C.A. § 40-4-202 and not a constitutional attack on M.C.A § 40-4-202, a contention which petitioner now raises for the first time before this Court. This distinction is apparent in petitioner's opening brief (p. 29) to the Montana Supreme Court:

> The disability retirement benefits of Mr. Karr are not *marital property* subject to direct or indirect division by the courts of this State. Nor can the Courts of this State award Mrs. Karr property to offset the disability pension

> of Mr. Karr. To indirectly regard the disability benefits as *marital property* and to award offsetting property to the spouse, violates the Congressional intent in military disability benefits and the Supremacy clause of the United States Constitution, Article VI, Paragraph 2. (Emphasis added).

Mrs. Karr responded to petitioner's threshold argument before the Montana Supreme Court solely on the basis of petitioner's limitation of the issues (1) whether the military retirement was a marital asset, (2) whether the award was an offset of marital property and (3) whether the District Court had abused its discretion. Petitioner in his reply brief to the Montana Supreme Court, (pp. 21 & 13) restates his attack on the District Court's exercise of discretion and that the military retirement cannot be marital property, stating:

> Judge Bennett may have reviewed the elements set forth in Section 40-4-202, M.C.A., i.e., the health of the parties, etc. but the findings and judgement amply show *an abuse of discretion* by Judge Bennett and an injustice to Mr. Karr by the Court dividing the marital assets on a 2 to 1 ratio in favor of Mrs. Karr. He arrived at this 2 to 1 ratio by repeated reference to the disability pension, its help to Mr. Karr and that Mrs. Karr had an annuity until he gave her this judgement. ...*The method employed by Judge Bennett is inequitable, an abuse of discretion.*
>
> ...*The 89% is not a marital asset* that can be divided or considered by the Court for any purpose in this matter. The 11% of this payments which is taxed as ordinary income is similarly *not a marital asset* that can be

> divided or considered by the Courts. The Supremacy Clause, Article VI, Clause 2, of the United States Constitution prohibits any state court action *on these monthly payments* in a petition for dissolution.
>
> Judge Bennett's Findings, Conclusions of Law and Judgement *were all structured on the basis of the monthly payments received by Mr. Karr.* Since these payments could not be considered for any purpose, the judgement must be vacated. (Emphasis added.)

In petitioner's Petition for Rehearing before the Montana Supreme Court, (p. 3) he repeated his argument that the issue was limited to a consideration of whether the military retirement was a marital asset, stating: "The disability pension of Mr. Karr cannot be considered either directly or indirectly in dividing the *marital assets* and to do so, either directly or indirectly, violates the Supremacy Clause of the United States Constitution, supra." (Emphasis added)

Not only did petitioner and respondent both consider the issues on appeal were limited to whether the military retirement is a marital asset, whether the award was an offset of marital property and whether the District Court abused its discretion, so did the Montana Supreme Court. In *Karr v. Karr, supra* at 273, that Court stated the issue: "Did the District Court err in considering in any way the military pension of James?" The Montana Supreme Court noted that it was proper for a District Court at that time to consider a military retirement as a marital asset. The Court also noted that M.C.A § 40-4-202 required the District Court to consider various factors and then equitably apportion the marital assets; performance of that duty was not an abuse of discretion. The Montana

Supreme Court simply did not address any challenge to the constitutionality of M.C.A. § 40-4-202.

This Court said in *Street v. New York*, 394 U.S. 576, 582 (1969):

> [T]his Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.

As argued above, Petitioner never raised the issue of whether M.C.A § 40-4-202 is unconstitutional before, he is therefore precluded from raising the issue at this time. Perhaps he was of the opinion that any decision on the military retirement issue by this court would resolve his case. In *McCarty, supra* at p. 2739, this Court ruled that a State Court cannot award any part of a military retiree's pay to an ex-spouse. The Montana courts did not award Mrs. Karr any part of the petitioner's military retirement and they expressly excluded it from the marital assets. Mrs. Karr's award of a lump sum was based on the marital assets being apportioned on a ratio of 2 to 1 for Mrs. Karr.

By raising a constitutional question already addressed in *McCarty*, petitioner cannot confer subject matter jurisdiction to this Court on a different constitutional issue. As noted in *Street v. New York*, if the state's highest court has not had the opportunity to consider constitutional issues then this Court cannot consider them. The Montana Supreme Court has not had the opportunity to consider whether M.C.A. § 40-4-202 is unconstitutional. Petitioner did not raise the issue below and accordingly cannot now raise the issue.

It also appears that Petitioner has failed to comply with this Court's Rule 28.4(c) requiring the Montana Attorney General be served with a copy of this petition. For this reason alone the petition should be denied.

2. *The decision below does not raise a substantial federal question.*

This Court in *McCarty, supra* at p. 2735, noted that "[t]the whole subject of the domestic relations of husband and wife...belongs to the laws of the States and not to the laws of the United States," and that "[s]tate family and family-property laws must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden." In making that determination this court formulated a two-prong test to determine if a federal statute would justify pre-emption: (1) "whether the right as asserted conflicts with the express terms of the federal law" and (2) "whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition."

As dissenting Justice Rehnquist in *McCarty* notes, the majority could find no express terms in the military retirement statutes to support its conclusions. Similarly, petitioner here is apparently unable to find any express terms in the military retirement statutes to support his petition. Petitioner has not even attempted to find any express terms in the military retirement statutes that conflict with the Montana Court decision; rather he relies exclusively on *McCarty*, which involved an issue even petitioner admits the Montana courts properly addressed. His petition fails to satisfy the mandate of this Court that the statute must expressly conflict with federal law in order to justify pre-emption of M.C.A. § 40-4-202.

The Montana courts complied with the *McCarty* rule when they decline to award the wife any portion of the husband's military retirement. Nor did the Montana courts include his military retirement as a marital asset. Furthermore, both Montana courts expressly stated that the lump sum award was not an offset for the husband's military retirement. Both courts set out the factors they were required to consider to make an equitable award of the marital property under M.C.A. § 40-4-202.

The military retirement statutes simply do not foreclose Montana courts from equitably apportioning marital assets, as long as those assets do not include the military retirement and no award is made of the retiree's military pay. Petitioner has conveniently ignored the requirement that the military retirement statute must expressly prohibit the Montana court's decisions in this matter before this Court can consider this matter.

Petitioner has attempted to join various portions of the Montana Supreme Court decision to make it appear that the court awarded the lump sum to the wife "to provide her with a like retirement source...." This attempt must fail. The Montana Supreme Court in reciting the factors considered by the District Court did conclude the District Court must have considered how much the wife would need in her retirement. The Montana Supreme Court then stated that the lump sum award would provide her with a like retirement "source." This is by no means an award of a retirement to the wife in exchange for the husband's military retirement. The Montana District Court did not make any such conclusion of law. The lump sum award was based solely on the existing marital assets and an equitable apportionment of those on a basis of 2 to 1 to the wife. The wife can take her $190,926 and do

anything she wants to with it. She is in no way required to convert it into an annuity or use it for her retirement.

Petitioner likewise argues that there must have been some forbidden "offset" with his military retirement. First, there is no legally forbidden "offset" involved in this case. The Montana Supreme Court, at p. 272, stated "The District Court did not include the pension as part of the military profit, *nor use it as a set-off*" (Emphasis added). Secondly, this Court declined to say in McCarty that an offset was forbidden in any event. While there is some dictum in footnote 22, page 2739, of *McCarty* referring to an offsetting award, that reference is to an "anticipation" of the retiree's pay. The Montana courts did not anticipate the husband's military pay and although petitioner feels the effect of the decision is the same, the law says that it is not as it has been expressly so stated by both Montana courts.

Petitioner is dissatisfied with the Montana court's conclusion that he has to pay his ex-wife $190,926. Now he seeks to attack the constitutionality of M.C.A. § 40-4-202 which required the Court to consider the amount and sources of a spouse's income, his employability, his estate, the needs of both parties and the opportunity of each for future acquisition of captial assets and income. As petitioner notes on p. 15 on his petition, the Montana divorce statutes are adopted from the Uniform Marriage and Divorce Act. The State Courts are required by statute to "consider" the above-noted factors; petitioner has not and can not demonstrate that this requirement expressly conflicts with the military retirement statute.

Petitioner asserts that the Montana courts cannot "Consider" a military retirement in making an equitable apportionment of marital assets. This argument ignores *McCarty*. On page 2740 of *McCarty* this

Court notes that 42 U.S.C. § 659 (1977) allows military pay to be subject to legal process to enforce child support or alimony obligations. In order to award child support, M.C.A. § 40-4-204 requires a court to consider the financial resources of both the custodial and non-custodial parent. In order to award maintenance (alimony) to a spouse, M.C.A. § 40-4-203(2)(f) requires a court to consider "the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance." The Montana statutes requires a court to "consider" the husband's income and ability to pay in ordering an award of either child support or alimony. If military retirement is subject to legal process to satisfy child support and alimony, and since a military retirement is required to be considered in determining if child support or alimony is to be paid, then Congress must have intended that military retirement be "considered" for purposes of determining the domestic relations of a husband and wife.

Finally, petitioner's election to convert his military retirement to a Veterans Administration retirement after the divorce decree was rendered in this matter is irrelevant. To allow a post-decree election to affect the property settlement would be unjust. Petitioner and respondent were bound to the facts as they were found to have existed on the date of the divorce, and the Montana Supreme Court has so held. It was only after the April 12 and 13, 1979 property disposition hearing that petitioner made this election. The divorce was granted on October 6, 1977 over 18 months before petitioner's belated election. The property disposition hearing was continued from April 13, 1979 to August 14, 1979 because petitioner's attorney could not reschedule the hearing for an earlier date. It was during this period of delay that petitioner made the election to try to improve his legal position in this

matter. While respondent does not agree that the election to use the statutory provisions under the Veterans Administration aids him in his petition here, that election is not relevant here because it was not in effect at the time of the divorce.

CONCLUSION

For these reasons, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

JAMES L. NORRIS
Attorney for Respondent
1315 Crestview
Vermillion, S.D. 57069
Telephone: (605) 624-5426

DATED this 17th day of September, 1981

STATE OF SOUTH DAKOTA)
: ss.
County of Clay)

JAMES L. NORRIS, being first duly sworn upon his oath, deposes and says:

That he is the attorney for the Respondent, JOANNE D. KARR, in the above entitled matter.

That on September 17, 1981, affiant personally certified that three (3) correct and true copies of "Respondent's Brief in Opposition" to petitioner's petition for a Writ of Certiorari to the Supreme Court of Montana were mailed to ROBERT J. EMMONS, 608 Strain Building, Great Falls, Montana 59401, as counsel for JAMES H. KARR, Petitioner.

This Proof of Service is made pursuant to Rule 33(3)(c) of the Rules of the United States Supreme Court.

James L. Norris
JAMES L. NORRIS

SUBSCRIBED AND SWORN to before me this 17th day of September, 1981.

Eleanor M. Hunter
ELEANOR M. HUNTER
Notary Public for the State of
South Dakota
Residing at Vermillion, South Dakota
Commission expires:
September 8, 1983

(NOTARIAL SEAL)

Appendix

APPENDIX A

APPLICABLE FEDERAL STATUTES:

42 U.S.C. § 659 (1977):

Enforcement of individual's legal obligations to provide child support to make alimony payments—United States and District of Columbia to be subject to legal process

(a) Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon renumeration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments. (Subsections (b), (c), (d), (e), and (f) are omitted since they do not bear on this matter.)

APPLICABLE MONTANA STATUTES:

M.C.A. § 40-2-202 (1979)

Disposition of property. (1) In a proceeding for dissolution of a marriage, legal seperation, or disposition of property following a decree of dissolution of marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the

court, without regard to marital misconduct, shall, and in a proceeding for legal separation may, finally equitably apportion between the parties the property and assets belonging to either or both, however and whenever acquired and whether the title thereto is in the name of the husband or wife or both. In making apportionment, the court shall consider the duration of the marriage and prior marriage of either party; antenuptial agreement of the parties; the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties; custodial provisions; whether the apportionment is in lieu of or in addition to maintenance; and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of value of the respective estates and the contribution of a spouse as a homemaker or to the family unit. In disposing of property acquired prior to the marriage; property acquired by gift, bequest, devise, or descent; property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent; the increased value of property acquired prior to marriage; and property acquired by a spouse after a decree of legal separation, the court shall consider those contributions of the other spouse to the marriage, including:

(a) the nonmonetary contribution of a homemaker;

(b) the extent to which such contributions have facilitated the maintenance of this property; and

(c) whether or not the property disposition serves as an alternative to maintenance arrangement.

(2) In a proceeding, the court may protect and promote the best interests of the children by setting aside a portion of the jointly and separately held estates of the parties in a separate fund or trust for the support, maintenance, education, and general welfare of any minor, dependent, or incompetent children of the parties.

M.C.A. § 40-2-203 (1979)

Maintenance. (1) In a proceeding for dissolution of marriage or legal separation or a proceeding for maintenance following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

(a) lacks sufficient property to provide for his reasonable needs; and

(b) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to marital misconduct, and after considering all relevant facts including:

(a) the financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to

which a provision for support of a child living with the party includes a sum for that party as custodian;

(b) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(c) the standard of living established during the marriage;

(d) the duration of the marriage;

(e) the age and the physical and emotional condition of the spouse seeking maintenance; and

(f) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

M.C.A. § 40-2-204 (1979)

Child Support. In a proceeding for dissolution of marriage, legal separation, maintenance, or child support, the court may order either or both parents owing a duty of support to a child to pay an amount reasonable or necessary for his support, without regard to marital misconduct, after considering all relevant factors including:

(1) the financial resources of the child;

(2) the financial resources of the custodial parent;

(3)the standard of living the child would have enjoyed had the marriage not been dissolved;

(4) the physical and emotional condition of the child and his educational needs; and

(5) the financial resources and needs of the noncustodial parent.

Brief for the United States

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

No. 81-363

In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES H. KARR, PETITIONER

v.

JOANNE D. KARR

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether federal law bars a state court from considering military disability retirement pay or veteran's service-connected disability compensation in any fashion in effecting an equitable apportionment of marital assets pursuant to state law upon divorce of the retired service member and his spouse.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-363

JAMES H. KARR, PETITIONER

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JOANNE D. KARR

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

A. Military Disability Retirement Pay

Under the military disability retirement statutes, any member of the armed forces may be retired by the Secretary for the appropriate service and granted military retired pay upon a determination that the

service member is permanently disabled from performing his duties and that certain other criteria are satisfied. 10 U.S.C. 1201. The rate at which a service member is paid upon retiring in this fashion is computed by a formula taking into account the rate of pay established for the rank attained and—at the election of the retiree—either the number of years served or the percentage of disability determined as of the date of retirement.[1] Like the nondisability military retirement pay plans considered in *McCarty* v. *McCarty*, No. 80-5 (June 26, 1981), slip op. 1-5, the disability retirement plan is noncontributory; neither the service member nor the federal government makes contributions to any fund during the period of active service and payments are funded by annual appropriations.[2] And like other retired officers, an officer retired on disability status remains subject to recall to active duty at times when his services are needed. See 10 U.S.C. 1402(c), 3504, 6481, 8504. Unlike other military retired pay (see *McCarty* v. *McCarty*, *supra*, slip op. 4 n.7), however, military disability retired pay is not taxable as income when it is received, except to the extent that the sum received is based upon the number of years served and exceeds the amount that would be due based upon the percentage of disability. 10 U.S.C. 1403; 26 U.S.C. 104(a).

As with the nondisability military retirement plans addressed in *McCarty* (slip op. 4-5), military disabil-

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[1] The sum to be paid, however, may not exceed 75% of the underlying rate of pay. 10 U.S.C. 1401.

[2] The military retirement programs are distinguishable in this respect from contributory retirement programs such as those established by the Civil Service Retirement Act, 5 U.S.C. 8331 *et seq.*, the Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.*, and the Social Security Act, 42 U.S.C. 301 *et seq.*

ity retired pay terminates with the service member's death and no right therein passes to his survivors. The statutes, however, provide a mechanism by which service members may elect to set aside a portion of their retired pay for survivors. Under the Retired Serviceman's Family Protection Plan, a participating service member may elect to reduce his retired pay in order to provide an annuity for a surviving spouse or child upon his death. 10 U.S.C. 1431-1446. Participation in the plan is entirely voluntary, and a service member may revoke his election "to reflect a change in the marital or dependency status of the member or his family that is caused by death, divorce, annulment, remarriage, or acquisition of a child." 10 U.S.C. 1431(c). Should the chosen beneficiary be rendered ineligible for the annuity through death or divorce, the retired pay is fully restored. See, *e.g.*, 10 U.S.C. 1434(c). In 1972, Congress enacted the Survivor Benefit Plan to replace prospectively the Family Protection Plan. 10 U.S.C. 1447-1455. The earlier plan had been actuarially sound, *i.e.*, the total amounts paid to survivors were equivalent in value to the amount withheld from the member's retired pay. As a result, participation significantly reduced the service member's pay, and participation in the plan was low. In response, Congress adopted the more generous Survivor Benefit Plan, which rests in part on government contributions and which covers retirees unless they act affirmatively to opt out. 10 U.S.C. 1448(a). Participants in the Family Protection Plan were given the option of continuing their existing arrangement or enrolling in the new plan. 10 U.S.C. 1448 note.

The military disability retirement system exists side by side with the scheme of compensation for service-connected disabilities administered by the Veterans Administration, 38 U.S.C. 331-337. The rate of disability compensation available from the VA is solely a function of the extent of disability, as determined by the VA independently of the determination made by the service upon the member's retirement. 38 U.S.C. 314, 334. Congress has prohibited any person from receiving duplicative payments under the military retirement and veterans compensation systems. 38 U.S.C. 3104(a). A person entitled to both forms of payment may, however, receive VA disability compensation to the extent that he waives an equal amount of his retirement pay entitlement. 38 U.S.C. 3105. A veteran's disability compensation is shielded from assignment, taxation, and the claims of creditors and is exempt from "attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." 38 U.S.C. (& Supp. III) 3101(a), (d). The only significant exception to this prohibition is that prescribed by Section 459(a) of the Social Security Act, 42 U.S.C. (Supp. III) 659(a), which permits garnishment of all federal benefits to satisfy a legal obligation for alimony or child support. "Alimony" is defined for these purposes "not [to] include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." 42 U.S.C. (Supp. III) 662(c).

B. The Present Proceedings

Petitioner and respondent were married in 1946 (Pet. App. 3a) and were divorced in 1977 (*id.* at 25a). During their marriage petitioner served at various times in the United States Navy and the United States Army. After 20 years of military service and attaining the rank of major, petitioner was discharged from the Army in 1969 with a 60% disability rating (*id.* at 3a-5a, 55a). He accordingly became eligible to receive military disability retired pay, which he evidently elected to have computed based upon his years of service. Petitioner did not participate in either the Retired Serviceman's Family Protection Plan or the Survivor Benefit Plan (Pet. 3). At the time of the dissolution of petitioner's marriage to respondent, petiitoner was receiving $1,105 a month as military disability retirement pay (*id.* at 33a).[3]

The State of Montana has adopted a common law equitable distribution system of marital property. A court entertaining divorce proceedings is empowered to effect an equitable apportionment of all assets belonging to either party (or to both jointly) "however and whenever acquired," without regard to considerations of title. Mont. Rev. Code Ann. § 40-4-202 (1979). In effecting the apportionment the court is directed to consider (*ibid.*):

> the duration of the marriage and prior marriage of either party; antenuptial agreement of the parties; the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties; custodial provisions; whether the appor-

[3] Petitioner states that at the time of his divorce 89% of his retirement pay was non-taxable (Pet. 3).

> tionment is in lieu of or in addition to maintenance; and the opportunity of each for future acquisition of capital assets and income.[4]

The court is also required to take into account "the contribution or dissipation of value of the respective estates and the contribution of a spouse as a homemaker or to the family unit." *Ibid.* Finally, in apportioning certain categories of separate property associated with one spouse,[5] the court is directed to consider, *inter alia*, the offsetting nonmonetary contributions of the other spouse as a homemaker. *Ibid.*

Subsequent to entry of the order dissolving their marriage, a trial to determine the disposition of the Karr's marital estate was held. The trial court determined that the marital estate included various bank accounts and securities, the cash value of several life insurance policies, certain retirement funds, and three parcels of real property (Pet. App. 37a-38a). The aggregate value assigned to the estate was $286,389 (*id.* at 38a). However, relying upon *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979), the court excluded petitioner's military retirement pay [6] and the proceeds of his National Service Life Insurance Policy.[7] Based

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[4] Marital misconduct is not to be considered.

[5] These include property acquired prior to marriage, property acquired by gift or any form of inheritance, and any form of asset into which one of the foregoing is subsequently converted.

[6] The court had found that the present value of petitioner's right to receive military retired pay over his projected life expectancy was $355,896 (Pet. App. 34a).

[7] See *Ridgway* v. *Ridgway*, No. 80-1070 (Nov. 10, 1981); *Wissner* v. *Wissner*, 338 U.S. 655 (1950). The proceeds of the National Service Life Insurance Policy are not at issue here.

upon consideration of the statutory factors, the court concluded that this estate was to be apportioned in a two-to-one ratio with the larger share going to the respondent (Pet. App. 38a). In support of the designated ratio, the court noted petitioner's superior earning ability based upon vocation, training and health,[8] and his resulting superior ability to acquire capital assets. A second factor noted by the court was the superior retirement security afforded to petiitoner by his military retirement pay. The court explained (*id.* at 39a-40a (citations omitted)):

> While [petitioner's] pension cannot be included in the marital property, or used as a set off, it can be considered as a source of income in arriving at the equitable apportionment required by the statute, just as it may be used in determining alimony or maintenance. * * * The federal law may hold our wrist from reaching into [petitioner's] retirement salary, but it need not blind our eyes to the reality of the situation. [Petitioner] has a comfortable, secure retirement income, in being, for the rest of his life. [Respondent], although she contributed as much to it as he did, will never receive a cent of it. After [petitioner] had begun enjoying his retirement income the [respondent] was forced to begin a retirement program of her own, at the age of 50, with an organization from which she could be dismissed, without fault on her part, next year. She has, in a word, a very small retirement fund at present and virtually no retirement security.

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[8] Petitioner is licensed as both a pilot and a dentist; his disability, based upon tuberculosis, was found not to impair his earning capacity. Respondent is employed as a dental technician but her earning potential was deemed to be limited by advancing arthritis in her hands (Pet. App. 38a).

Respondent was allotted a share of $190,926 in the marital estate plus attorney's fees (*id.* at 40a).

Both parties appealed the trial court's decision to the Montana Supreme Court. Respondent challenged the exclusion of the value of petitioner's retirement pay from the marital estate as contrary to state law. Conversely, petitioner asserted, *inter alia*, that the trial court's consideration of his retirement pay as a factor in settling upon an equitable ratio of apportionment was contrary to *Hisquierdo* v. *Hisquierdo*, *supra*.[9] Petitioner argued that consideration of his military retirement pay in the apportionment process was especially inappropriate because, pursuant to 38 U.S.C. 3105, he had in 1979 waived a portion of his disability retirement pay in favor of receiving an equivalent amount in service-related disability compensation from the Veterans Administration.[10]

The Montana Supreme Court affirmed the trial court's decision (Pet. App. 1a-23a). Noting that "[t]he District Court was careful not to include the *value* of the retirement pension to be received by [petitioner] as a part of the marital estate" (*id.* at 10a), the court

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[9] The Montana Supreme Court rendered its decision on April 1, 1981, and denied rehearing on May 28, 1981, prior to entry of this Court's decision in *McCarty* v. *McCarty*, *supra* (Pet. App. 1a).

[10] This election was made prior to entry of the trial court's apportionment decision, but is not adverted to therein. The effect of the waiver was to render applicable the anti-attachment provision that governs all Veterans Administration benefits, 38 U.S.C. 3101(a). See page 4, *supra*. The Veterans Administration informs us that petitioner was rated totally disabled for purposes of service-related disability compensation payments.

> h[e]ld it proper, and in harmony with the principles of equity, that the District Court consider the income from a party's federal military retirement pension, earned during the marriage, in arriving at an equitable apportionment on the marital assets, particularly when the District Court is considering the statutory factor of the parties' opportunity for future acquisition of capital assets and income.

Id. at 12a-13a. Although it observed that it had, in earlier cases, upheld inclusion of the military retirement pay in an apportionable estate,[11] the court neither disavowed nor reaffirmed those decisions, evidently deeming the rationale of the trial court's decision sufficiently distinguishable from that of the earlier cases to avoid any conflict with *Hisquierdo* that might infect the earlier cases (*id.* at 11a-12a). However, in response to petitioner's argument resting upon 38 U.S.C. 3101(a), the anti-attachment provisions governing his VA disability compensation, the court did address the question of federal pre-emption (*id.* at 13a-15a).[12] In this connection, the court simply relied upon the decision in *In re Marriage of Milhan*, 27 Cal. 3d 765, 613 P.2d 812, 166 Cal. Rptr. 533 (1980), upholding a community property division

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[11] The court cited (Pet. App. 11a), *inter alia*, *In re Marriage of Miller*, 609 P.2d 1185 (1980). The decision cited was expressly disapproved in *McCarty* v. *McCarty*, *supra*, slip op. 23, and was subsequently vacated by this Court and the case remanded for consideration in light of *McCarty*. *Miller* v. *Miller*, No. 80-291 (July 2, 1981).

[12] The court did not decide whether, as respondent had claimed, petitioner's election to receive veterans compensation in lieu of part of his military retirement pay came too late to be effective with respect to the apportionment proceedings.

of VA disability compensation paid in lieu of military disability retirement pay.[13] Finally, the court rejected respondent's assertion of error, stating simply (*id.* at 23a):

> What we have said * * * disposes of the cross-appeal. The District Court, in its discretion, did not include the present value of [petitioner's] pension. Yet, the judgment of the Court, and the method of handling the distribution of the assets is eminently fair to [respondent]. In this case, the District Court decided, in its discretion not to include this item as a marital asset. We will leave the District Court's decision on this point undisturbed.

DISCUSSION

The principles that govern the question presented in this case are well established. As the Court recently explained in *McCarty* v. *McCarty*, No. 80-5 (June 26, 1981), " '[t]he whole subject of the domestic relations of husband and wife * * * belongs to the laws of the States and not to the laws of the United States.' " Slip op. 9-10, quoting *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 581 (1979), and *In re Burrus*, 136 U.S. 586, 593-594 (1890). Thus, " '[s]tate family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden.' " *McCarty* v. *McCarty*, *supra*, slip op. 10, quoting *Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S. at 581. On the other hand, even in the area of domestic relations this Court "has not hesitated to protect, under the Supremacy Clause, rights and expectancies

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[13] This Court subsequently vacated the judgment in *Milhan* and remanded for consideration in light of *McCarty* v. *McCarty*, *supra*. *Milhan* v. *Milhan*, No. 80-578 (July 2, 1981).

established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights." *Ridgway* v. *Ridgway*, No. 80-1070 (Nov. 10, 1981), slip op. 8, citing *McCarty* v. *McCarty*, *supra*; *Hisquierdo* v. *Hisquierdo*, *supra*; *Free* v. *Bland*, 369 U.S. 663 (1962); *Wissner* v. *Wissner*, 338 U.S. 655 (1950); and *McCune* v. *Essig*, 199 U.S. 382 (1905). Under these principles federal law has been held to override the inconsistent terms of a divorce decreed by a state court, *Ridgway* v. *Ridgway*, *supra*, slip op. 8, and, more relevant, to preclude a state court from dividing military retirement pay pursuant to state community property laws. *McCarty* v. *McCarty*, *supra*. Finally, these principles are applicable to jurisdictions employing common law systems respecting marital property as well as to community property jurisdictions. See slip op. 23; *Ridgway* v. *Ridgway*, *supra*, slip op. 8-9.

Notwithstanding the foregoing, the decision of the Supreme Court of Montana does not warrant further review. In our view the trial court's limited consideration of petitioner's military pay in framing an equitable apportionment of the marital estate from which that pay was excluded does not do major damage to clear and substantial federal interests underlying the military retired pay or veterans disability compensation programs. And while some of the reasoning of the Montana Supreme Court is at odds with *McCarty* v. *McCarty* and other portions of that court's reasoning are unfortunately ambiguous, the result upheld is not impermissible. In these circumstances, further review is not warranted.

1. In *McCarty* and *Hisquierdo*, this Court concluded that federal law precludes dispositions of military

and railroad retirement benefits pursuant to inconsistent state law. In each case a state court had included the federal benefits in a marital estate and divided them under community property principles even though such benefits were the "personal entitlement" of the retiree (*McCarty* v. *McCarty*, *supra*, slip op. 22) and were intended by Congress "actually [to] reach the beneficiary." *Id.* at 18, quoting *Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S. at 584. Because such retirement benefits are the personal entitlement of the retiree, this Court concluded that "[r]etired pay cannot be attached to satisfy a property settlement incident to the dissolution of a marriage." *McCarty* v. *McCarty*, *supra*, slip op. 18.

In contrast to *McCarty* and *Hisquierdo*, the trial court in this case asserted no right to apportion petitioner's pension—a determination upheld by the Montana Supreme Court. Rather, the court merely refused to shut its eyes to the obvious consequences of petitioner's inalienable rights in his retirement pay and disability compensation—a level of retirement security significantly better than respondent's. This circumstance, in turn, was merely one of the factors that led the trial court to decree a two-to-one ratio of apportionment of the marital estate. Because of the substantial strain that would be placed upon the integrity of a marital property system requiring equitable apportionment if the trier of fact is obliged to pretend that a substantial asset, available only to one of the parties, simply does not exist, such a result is not to be required unless clearly commanded by the terms or the policy of the applicable federal statutes.

We conclude that the result below neither conflicts with the language of the applicable federal statutes nor injures the objectives of the federal program.

First, there is no express language in the federal statutes that precludes the limited weight given to petitioner's federal entitlements in arriving at an equitable ratio of apportionment. In *Hisquierdo*, the Railroad Retirement Act of 1974 included an anti-attachment provision (45 U.S.C. 231m) that precluded state court interference in the disposition of the benefits paid under the statutory scheme. See 439 U.S. at 583-586. In *McCarty* (slip op. 13-19) a constellation of interrelated provisions were held to establish that military retirement pay is the personal entitlement of the retiree. These included 10 U.S.C. 3929 ("A member of the Army retired under this chapter is entitled to retired pay * * *."), 10 U.S.C. 2771 (providing that payment of arrearages owing upon death of the retiree to a designated beneficiary "bars recovery by any other person of the amount paid."), and 10 U.S.C. (Supp. III) 1434 and 1450 (making clear the retiree's absolute right under the Retired Serviceman's Family Protection Plan and the Survivor Benefit Plan, respectively, to deprive a spouse of any share in the annuities established under these plans). In the instant case, insofar as retired pay is involved, the pertinent statutory language is the same as that considered in *McCarty*. And insofar as petitioner's election to take veterans' disability compensation as a partial substitute may be relevant, the anti-attachment language invoked is comparable to that considered in *Hisquierdo*. But the trial court's decision did not seize any part of petitioner's pay or compensation or otherwise affect his right to spend his entire federal entitlement. Accordingly, the decision below does not conflict with the statutory language in any manner comparable to that condemned in *Hisquierdo* or *McCarty*.

Nor does the decision below substantially damage the objectives of the military retirement system. Those objectives are two-fold: "to provide for the retired service member, and to meet the personnel managment needs of the active military forces." *McCarty* v. *McCarty*, *supra*, slip op. 22.[14] As to the former, this Court noted in *McCarty* that "[s]tate courts are not free to reduce the amounts that Congress had determined are necessary for the retired member" (*ibid.*). As to the personnel management objective this Court noted, *inter alia*, that "the military retirement system is designed to serve as an inducement for enlistment and reenlistment * * *." *Id.* at 23. The Court observed that "[t]he value of retired pay as an inducement for enlistment or reenlistment is obviously diminished to the extent that the service member recognizes that he or she may be involuntarily transferred to a State that will divide that pay upon divorce." *Id.* at 24. Because the decision below does not affect the receipt and full use of the proceeds of petitioner's retired pay benefits, it is clear that the decision does not unduly impair the congressional objective of providing for the needs of service members or diminish the attractiveness of retired pay as an inducement for enlistment or reenlistment in the military. Plainly, Congress could not assume that a retired service member would have any particular level of assets to supplement his federal entitlements. Accordingly, there is a substantial difference between diminution of the federal entitlement and mere consideration of its existence in apportioning other assets.

2. Petitioner nevertheless contends (Pet. 8-10, 13-15) that the practical effect of the decision below is

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[14] These objectives plainly also underlie the veterans' disability compensation system.

to afford respondent the equivalent of a share of his federal entitlements. While petitioner's contentions are not without some theoretical force, we are unable to agree with petitioner's conclusion based upon the present record. To be sure, it would be possible in some cases for a trial court to adjust the ratio of apportionment so as to afford the non-military spouse the same dollar amount as he or she would have received had the present value of the retired pay been included in the marital estate and a different ratio of apportionment based on other factors employed.[15] But there is no affirmative evidence that that actually occurred here. It is, in any event, an implausible reading of the facts of this case, because if the present value of the retired pay were included in the apportionable estate, the sum awarded to respondent would represent less than a third of the total. Because the trial court offered plausible reasons—completely apart from the superior retirement security provided petitioner by his federal entitlements—for favoring respondent over petitioner, it is difficult indeed to believe that the court engaged in the subterfuge suggested. We would not lightly at-

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[15] There may be circumstances in which it would be difficult to distinguish an apportionment of this kind from a simple offsetting award, which is evidently barred by the decision in *McCarty* (slip op. 18 n.22). Of course, the decision below could be regarded as effecting a partial offsetting award. A proper balance between the policy underlying the federal benefit programs and the force of state law within the domestic relations sphere may nevertheless permit that result where achieved through a neutral application of state law criteria without discrimination against the federal beneficiary based upon the source of his benefits. Even if this is not so, this is an inappropriate case in which to clarify this point, for there were substantial grounds, independent of petitioner's superior retirement security, that supported the apportionment ratio.

tribute such conduct to a state court. A different question might well be presented if, for instance, the factors assigned to support an apportionment ratio were so insubstantial as to suggest a covert effort effectively to apportion the federal entitlement. And we submit that there will be time enough for this Court to curb such abuses by exercising its power of review in an appropriate case that typifies such a pattern of abuse, should the same emerge. This is not such a case.[16]

We note, as well, that the treatment given petitioner's federal entitlements does not appear to represent discriminatory treatment of this kind of asset. Montana apparently does not recognize any form of separate property—other than entitlements protected by federal law—as entirely exempt from apportionment as a matter of law. Mont. Rev. Code Ann. § 40-4-202 (1979) (see pages 5-6, *supra*). Instead, property acquired prior to marriage or by inheritance is included in the apportionable pool. The separate source of such property is to be considered in effecting the apportionment, but countervailing considerations are also to be considered. Plainly, more serious concern for the integrity of the federal scheme would be warranted if a state excluded such "separate" property from apportionment entirely, and its courts characteristically gave *no* weight to the existence of such property in fixing an equitable apportionment ratio, applying a contrary rule only to federal entitlements.

3. Finally, petitioner stresses (Pet. 7, 11-12, 16-17) language and citations in the Montana Supreme

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[16] The inability of a court actually to grant a spouse any share in the present value of the federal entitlement itself (see *McCarty* v. *McCarty*, *supra*, slip op. 23, disapproving *In re Marriage of Miller*, *supra*) will, as a practical matter, substantially reduce the ability of a state court to achieve the functional offset petitioner fears.

Court's decision that suggest that that court did not recognize the limits that federal law places upon the disposition of military retired pay and veterans' benefits in divorce proceedings under Montana law. We agree with petitioner that the Montana Supreme Court's reasoning (Pet. App. 13a-15a) regarding the effect of 38 U.S.C. 3101(a) is inconsistent with *McCarty* and that the court's reliance upon *In re Marriage of Milhan*, *supra*, subsequently vacated in light of *McCarty*, reveals an incorrect understanding of the governing principles. Nevertheless, there is no occasion for further review. First, as explained above, the trial court's decision does not rest upon the erroneous proposition that the federal entitlement may be apportioned by a state court; so much of the Montana Supreme Court's opinion as appears to approve that proposition is arguably *dictum*. In any event, in light of this Court's intervening decision in *McCarty*, and the vacatur of the state court decisions in *Miller* (see note 11, *supra*) and *Milhan*, there is no reason to believe that the Montana courts require further instruction on this point at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 387722 820